In The

# Supreme Court of the United States

October Term, 1978

No. 78-386

JEANNETTE C. WALDERT,

*Plaintiff-Appellee,*

*v.*

CITY OF ROCHESTER,

*Defendant-Appellant,*

*and*

THOMAS R. FREY,

*Intervenor-Defendant-Appellant.*

**On Appeal From The Court Of Appeals Of The State Of New York**

## JURISDICTIONAL STATEMENT

LOUIS N. KASH, ESQ.
Corporation Counsel
*Attorney for Appellants*
30 Church Street
Rochester, New York 14614
(716) 428-6986

*On the Brief,*
Susan L. Hauser, Esq.
Barry C. Watkins, Esq.

Daily Record Corporation
Rochester, New York
(4099)
Spaulding Law Printing
Syracuse, New York

## TABLE OF CONTENTS

## TABLE OF CASES







## STATUTES



## TEXTS

In The

# Supreme Court of the United States

October Term, 1978

No.

JEANNETTE C. WALDERT,

*Plaintiff-Appellee,*

*v.*

CITY OF ROCHESTER,

*Defendant-Appellant,*

*and*

THOMAS R. FREY,

*Intervenor-Defendant-Appellant.*

**On Appeal From The Court Of Appeals Of The State Of New York**

## JURISDICTIONAL STATEMENT

Appellants City of Rochester and Thomas R. Frey are appealing from the decree of the New York Court of Appeals, dated June 8, 1978, insofar as that decision upheld the scheme of property tax limits in Article VIII, Section 10 of the New York Constitution as it applies to the City of Rochester. Appellants submit this jurisdictional statement to show that this Court has jurisdiction of the appeal and that a substantial federal question is presented.

The citations to the opinions below are as follows:

> *Waldert v. City of Rochester*, 44 N.Y.2d 831, 406 N.Y.S.2d 752 (1978); 61 A.D.2d 147, 402 N.Y.S.2d 655 (App. Div., 4th Dept. 1978); 90 Misc.2d 472, 395 N.Y.S.2d 939 (Sup. Ct., Monroe Co. 1977).

This action was brought by appellee Waldert against the City of Rochester for a declaratory judgment declaring New York Laws of 1976, chapter 349, unconstitutional, and declaring the 1976-77 real property tax levy of the City of Rochester to be illegally in excess of the real property tax limit in Article VIII, Section 10 of the New York Constitution. The City of Rochester defended the action on the grounds that L. 1976, c. 349 was constitutional under the New York Constitution, and that the tax limits in Article VIII, Section 10 of the New York Constitution were themselves unconstitutional under the Fourteenth Amendment to the United States Constitution. Thomas R. Frey, a citizen and taxpayer of the City of Rochester, was permitted to intervene by order of the Supreme Court, Monroe County, for the purpose of arguing the Fourteenth Amendment issues.

The decree sought to be reviewed in this appeal was rendered by the New York Court of Appeals in its Remittitur dated and entered June 8, 1978. The Notice of Appeal was filed on June 15, 1978, with the Clerk of the Supreme Court, Monroe County, New York, the court possessed of the record.

Jurisdiction of this appeal is conferred on this Court by 28 U.S.C. §1257(2).

Because this Court's jurisdiction is conferred by 28 U.S.C. §1257(2), no cases are relied upon to sustain jurisdiction.

At issue in this appeal is the validity, under the Fourteenth Amendment to the United States Constitution, of Article VIII, Section 10 of the New York Constitution. (The text of Article VIII, Section 10 is set forth in the Appendix.)



## QUESTIONS PRESENTED

1. The first question presented in this appeal is whether, as appellants contend, the property tax limits in Article VIII, Section 10, of the New York Constitution are unconstitutional under the Fourteenth Amendment to the United States Constitution. In particular, the question presented is whether the state tax limits, unequal on their face, deny to the citizens of the City of Rochester the equal protection of the laws and due process of law because the more stringent tax limit imposed upon Rochester prevents access for its citizens to the same level of municipal and school services which is available to citizens of the state's smaller cities and other municipal jurisdictions.

2. The second question presented in this appeal is whether, as appellants contend, summary judgment was improperly granted in the state courts below to the appellee. In particular, the question presented is whether the appellants have set forth in the record facts sufficient to require a trial of any issues of fact relating to the appellants' equal protection and due process claims.

In this Court, as in all the state courts below, appellants argue not for summary judgment in their favor, but only for a reversal of summary judgment to appellee Waldert so that there can be a trial on the Fourteenth Amendment claims. Thus, the appellants bring this appeal in order to demonstrate that their Fourteenth Amendment claims have sufficient merit to warrant development of a full record at trial.

## STATEMENT OF THE CASE

Article VIII, Section 10 of the New York Constitution sets different limits on the annual local property tax levy of certain types of municipalities and school districts, and no limits on others. Where a limit is imposed, it is framed in terms of a given percentage of the previous five-year average full valuation of the taxable real property within that municipality or district. Each limit is on taxes levied for operating expenses; excluded from the limits are taxes levied to pay debt service, or to pay for items of expense with a useful life exceeding one year. The limits specify that the taxes must be used for particular categories of municipal purposes.

The limits set may be charted as follows:

| Type of Municipality | Purpose of Taxes | Tax Limit (% of full value) |
|---|---|---|
| Cities over 125,000 population (hereinafter "large cities") | City and school purposes | 2% |
| Cities under 125,000 population (hereinafter "small cities") | City purposes | 2% |
| School districts in cities under 125,000 population | School purposes | 1¼% - 2% |
| City of New York | City, school and county purposes | 2½% |
| Villages | Village purposes | 2% |
| Counties | County purposes | 1½% - 2% |

In counties and in school districts in small cities, the limit may be raised incrementally within the allowable range — in counties, by either the governing body or referendum of the voters, and in school districts in small cities, by referendum of the voters. For school districts outside the cities, there are no tax limits although the school budget must be approved by the voters annually. For towns, some of which are larger than most cities, there are no tax limits of any kind.



As actually written, the state constitution appears to impose the same 2% limit "for city purposes" on large cities as on small cities. (Appendix p. A-1) However, by long-standing tradition the limit on large cities has been held to include taxes for school purposes while the limit on small cities does not; indeed, as indicated in the chart above, school districts in small cities have an independent tax limit potentially as large as the limit for cities themselves. The effect of this is to allow citizens of small cities to levy up to twice the amount of property taxes for city and school purposes as citizens of large cities can.

In the state courts below the appellants urged that the phrase "for city purposes" in the state constitution be interpreted identically for large and small cities. Such an interpretation would have corrected the substantial inequality of treatment between large and small cities. However, the appellee opposed this interpretation and the state courts below rejected it, thus settling finally the state's interpretation of its tax limits.[1]

---

[1]The appellee here, Waldert, brought this action against the City of Rochester alleging that Rochester's tax levy exceeded its 2% tax limit in the fiscal year 1976-77. The major state issue was whether chapter 349 of the 1976 Laws of New York, which allowed Rochester (and other large cities) to levy property taxes in excess of the tax limit to pay for employee pension and social security costs, violated the state constitution. The state courts held that pension and social security costs were operating costs and could not be exempted from the tax limit of the state constitution by mere act of the legislature. It was in this context that Rochester also urged the non-traditional interpretation of the phrase "for city purposes". Rochester's 2% tax limit for 1976-77 was $42,803,962; its tax levy for that year, including operating, pension, and social security costs for both city and school purposes was $71,798,131. If Rochester had been allowed the tax limits given to small cities and school districts in small cities, the challenged tax levy would have been legal and valid. As it is, however, Rochester has had to roll back its property taxes by approximately $30,000,000 and may have to refund millions more.

In this appeal, the appellants urge that Article VIII, Section 10 of the New York Constitution must fall as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[2] The scheme of tax limits prescribed by that section arbitrarily and irrationally deprives citizens of large cities such as Rochester of the ability to provide for themselves the same high level of municipal and school services as is available to citizens of other municipalities.[3] Such irrational and invidious discrimination contravenes the Equal Protection Clause of the Fourteenth Amendment.

Both the City of Rochester, on behalf of its citizens who thus suffer discrimination, and Thomas R. Frey, on his own behalf as an individual Rochester citizen who thus suffers discrimination, appeal to this Court to reverse the decision below insofar as it

---

[2]In many instances there are common threads of analysis established by this Court between equal protection cases and due process cases.

> One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government. *Department of Agriculture v. Murray*, 413 U.S. 508, 517 (1973). See also: *Frontiero v. Richardson*, 411 U.S. 677, 680, n.5 (1973), and *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977).

Appellants have limited their analysis to the equal protection issue. However, because violations of the Equal Protection Clause often necessarily mean violations of the Due Process Clause as well, it is appellants' position that the tax limits in this case violate both the Equal Protection and Due Process Clauses.

[3]For example, not only do small cities have greater taxing power than large cities, but many of those small cities in fact take advantage of that power to impose tax levies which would exceed the 2% limit of a large city. See table (pp. 9-10), which shows that the combined city and school taxes in many small cities in New York State in 1976-77 considerably exceeded 2% of their five-year average full value. Another example of the arbitrary and irrational character of the tax limit scheme is that it allows the Town of Hempstead, N.Y., merely because it is a town and not a city, to levy property taxes without limit, although Hempstead's population is more than 800,000 — three times Rochester's.



granted summary judgment to the appellee Waldert upholding this discriminatory scheme of tax limits in the New York Constitution as it applies to the City of Rochester.

## HOW THE FEDERAL QUESTION WAS PRESENTED

The question of the constitutionality of Article VIII, Section 10, of the New York Constitution under the Fourteenth Amendment to the United States Constitution was originally raised as a specific defense in the answer of the appellant City of Rochester and in the answer of the intervenor-appellant Thomas R. Frey (R. 89, 183-84). The appellee Waldert moved to strike that defense, among others, as being without merit and for summary judgment. The court of original jurisdiction granted those motions. Procedurally, then, each appeal, including this one, has sought reinstatement of the defense raising the federal question, as having merit, and a trial of the factual issues presented by that defense. The federal question was raised by the appellants' Notices of Appeal at each level, which specified that an appeal was taken from all issues which had been decided adversely to appellants, including the federal question (R. 3-8, 40-41, A-4, 5).

The federal question was fully briefed and argued in the Special Term of the Supreme Court, Monroe County, the court which heard this case originally, and also in the two appellate courts, the Appellate Division of the Supreme Court, Fourth Department, and the New York Court of Appeals. The two lower state courts addressed the federal question in their opinions. The Special Term, in upholding the tax limits, held, in pertinent part, as follows:

> For me to hold that [Article VIII, Section 10] is unconstitutional and in conflict with the Fourteenth Amendment would emasculate all of New York State's tax and debt limits. This I am not about to do. The dif-

ferences between the debt [sic][4] limits in school districts in cities of over 125,000 and under 125,000 population represents a matter of public policy which was settled when the New York Constitution was adopted by the people. (R. 66) 90 Misc.2d 472, 480-81.

On appeal, the Appellate Division affirmed, devoting only three paragraphs to its equal protection analysis. In support of its finding of a rational basis for the tax limits, the court cited one case, *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283, 296 (1898). In addition, the court stated, without discussion, that it rejected "appellant's argument that there are questions of fact presented in the record which require a hearing on the [equal protection] issue." (R. 34-35) 61 A.D.2d 147, 164.

Although, as noted, the federal question was fully briefed and orally argued in the New York Court of Appeals, that court was silent on the equal protection issue in its per curiam opinion affirming the Appellate Division.

[4]Debt limits are set forth in Article VIII, Section 4 of the New York Constitution, and are not in issue in this case.



**OPERATING TAX LEVIES IN CITIES UNDER 125,000, 1976-77, EXPRESSED AS PERCENTAGE OF FULL VALUE OF TAXABLE REAL PROPERTY.**
**(Includes taxes for pension & social security costs)**

| City | City Levy | City School District Levy | Total Tax Levy |
|---|---|---|---|
| Albany | 1.56 | 1.63 | 3.19 |
| Amsterdam | 1.04 | 1.33 | 2.37 |
| Auburn | 1.05 | 1.75 | 2.80 |
| Batavia | 0 | 1.96 | 1.96 |
| Beacon | 1.94 | 1.44 | 3.38 |
| Binghamton | 2.00 | 2.07 | 4.07 |
| Canandaigua | .21 | 1.35 | 1.56 |
| Cohoes | 1.56 | 1.84 | 3.40 |
| Corning | .73 | 2.08 | 2.81 |
| Cortland | .84 | 1.90 | 2.74 |
| Dunkirk | .93 | 1.48 | 2.41 |
| Elmira | 1.53 | 1.91 | 3.44 |
| Fulton | .15 | 2.09 | 2.24 |
| Geneva | 1.07 | 2.03 | 3.10 |
| Glen Cove | 1.12 | 2.54 | 3.66 |
| Glens Falls | 1.32 | 2.22 | 3.54 |
| Gloversville | .56 | .81 | 1.37 |
| Hornell | 0 | 1.55 | 1.55 |
| Hudson | 1.35 | 1.86 | 3.21 |
| Ithaca | .68 | 2.05 | 2.73 |
| Jamestown | 1.13 | 1.45 | 2.58 |
| Johnstown | .85 | .90 | 1.72 |
| Kingston | 1.46 | 2.44 | 3.90 |
| Lackawanna | 1.37 | 1.78 | 3.15 |
| Little Falls | 1.40 | 1.22 | 2.62 |
| Lockport | 1.03 | 2.00 | 3.03 |
| Long Beach | 1.50 | 2.55 | 4.05 |
| Mechanicville | 1.09 | 1.96 | 3.05 |
| Middletown | 1.74 | 1.94 | 3.68 |
| Mount Vernon | 1.66 | 2.82 | 4.48 |
| Newburgh | 1.76 | 2.45 | 4.21 |
| New Rochelle | 1.74 | 2.66 | 4.40 |
| Niagara Falls | 1.83 | 2.20 | 4.03 |
| North Tonawanda | .94 | 1.89 | 2.83 |
| Norwich | .43 | 1.80 | 2.23 |
| Ogdensburg | 1.68 | 1.42 | 3.10 |
| Olean | .73 | 1.94 | 2.67 |

**OPERATING TAX LEVIES IN CITIES UNDER 125,000, 1976-77, EXPRESSED AS PERCENTAGE OF FULL VALUE OF TAXABLE REAL PROPERTY.**
**(Includes taxes for pension & social security costs)**

| City | City Levy | City School District Levy | Total Tax Levy |
|---|---|---|---|
| Oneida | .41 | 1.50 | 1.91 |
| Oneonta | 1.36 | 1.66 | 3.02 |
| Oswego | .76 | 1.63 | 2.39 |
| Peekskill | 1.85 | 3.14 | 4.99 |
| Plattsburgh | .22 | 1.57 | 1.79 |
| Port Jervis | .89 | 1.37 | 2.26 |
| Poughkeepsie | 1.93 | 2.49 | 4.42 |
| Rensselaer | 1.70 | 1.95 | 3.65 |
| Rome | 1.03 | 1.39 | 2.42 |
| Rye | 1.28 | 2.36 | 3.64 |
| Salamanca | 1.85 | 1.23 | 3.08 |
| Saratoga Springs | .82 | 1.38 | 2.20 |
| Schenectady | 1.69 | 1.84 | 3.53 |
| Sherrill | .87 | 1.32 | 2.19 |
| Tonawanda | 1.16 | 1.59 | 2.75 |
| Troy | 1.11 | 2.54 | 3.65 |
| Utica | 1.78 | 1.67 | 3.45 |
| Watertown | .91 | 1.79 | 2.70 |
| Watervliet | 1.02 | 1.88 | 3.90 |
| White Plains | 1.27 | 2.06 | 3.33 |

Sources: Charts prepared by the State of New York, Department of Audit and Control, Division of Municipal Affairs, Bureau of Municipal Research and Statistics: "City School Districts in Cities Under 125,000 Population, Tax Limit Data for Fiscal Year 1976-77." "Cities: Percent of Tax Limit Used 1977," March, 1978.



## THE FEDERAL QUESTION IS SUBSTANTIAL

Appellants contend that the different property tax limits set forth in Article VIII, Section 10 of the New York Constitution deny to the citizens of the City of Rochester the equal protection of the laws.

Appellants further contend that this equal protection claim should not be decided on a motion for summary judgment. The factual issues concerning the impact of different property tax limits on the various local municipalities in New York State are enormously complex. Furthermore, while appellants have made a *prima facie* factual showing on the record supportive of their equal protection claim, appellee Waldert has relied only on conclusions of law and has failed to set forth any facts with which to rebut appellants' factual showing.

By way of introduction to Point I set forth below, it should be noted that the issue of placing legal limits on the levying of real property taxes has recently become an important concern throughout the nation, as illustrated by "Proposition 13" approved in California. Similar tax limit provisions are being proposed in other states. While this case does not arise out of a widespread "tax revolt" in Rochester, New York, it nevertheless presents this Court with a timely and appropriate opportunity to address the question of what guidelines must be met for tax limit schemes to pass federal constitutional muster.

In order to appreciate the claim of the appellants that New York's current scheme of tax limits deprives Rochester residents of the equal protection of the laws, it is necessary to understand how tax limits operate. A tax limit only comes into play at that point when the normal processes by which local budgets and tax levies are determined push the dollar amount of the tax levy up to the limit, and would push it higher except for the limit. That is to say, if the local elected officials who pass the budget and levy the taxes for a particular municipality choose to impose a

tax levy well below the limit, then the limit is of no effect; it protects no one and it hinders no one. However, once that point is reached, where the tax levy is right up to the limit, it is crucial to see exactly whose interests are involved: who is being protected and who is being hindered.

It is perhaps obvious but nonetheless important to note that the people who pay local taxes are, by and large, the same people who benefit from the municipal and school services which those tax dollars make possible. They are also, by and large, the same people who elect the local officials who pass the annual municipal and school budgets and levy the annual municipal and school taxes. Those local residents have to balance for themselves the opposing ideals of lower taxes with a correspondingly lower level of municipal and school services, against higher taxes, with a correspondingly higher level of services. As taxpayers, they benefit from lower taxes; but as local residents and parents, they benefit from higher municipal and school services. As voters, they are called upon to balance the two ideals and elect officials who will implement that chosen balance.

Any tax limit is also necessarily a spending limit; they are two faces of the same coin. If a municipality or school district is limited in the amount of tax revenue it can collect, it is also necessarily limited in the amount it has to spend. As a limit on taxes, the limit benefits residents; but as a limit on spending, and thus on services, it hurts them.

This is not to say that tax limits in themselves are inappropriate. It is clearly within the power of the state to declare that, regardless of the will of the residents of any particular taxing jurisdiction, a certain level of local taxation may not be exceeded, even though that necessarily curtails the level of local spending.

The problem is not with tax limits per se, but with tax limits which apply unequally to different taxing jurisdictions. A



rational and equitable system of tax limits may hamper the desires of some individual local residents who would prefer a level of taxation and spending in excess of that permitted, but at least it does so constitutionally. But when a system of tax limits imposes a substantially lower tax limit on certain jurisdictions than others, for no reason, then the citizens of those jurisdictions are arbitrarily deprived of important municipal and educational services which citizens elsewhere can provide for themselves, and that is unconstitutional.

The pernicious effect of a discriminatory tax limit comes really from its obverse aspect as a spending limit. It may seem disingenuous for a taxpayer to assert that he is injured by a too-strict limit on the amount of money which his local government can exact from him in taxes. But it is not at all unreasonable for a taxpayer to assert that he is injured by a too-strict limit on the amount of money which his government can spend to provide municipal and educational services for him and his family. It distorts the real effect of tax limits to characterize them merely as limitations on the local governments to which they apply. The government is, in a sense, no more than a conduit which turns tax dollars from local residents into municipal and school services for those same residents. The government has no need for taxes other than to provide the services demanded by its citizens.

In 1976-77 (the tax year in issue here), the City of Rochester levied property taxes in excess of its tax limit (see footnote 1 above at page 5). That tax levy was authorized by the City Council, acting on behalf of and in the interest of the citizens of Rochester. Under that tax levy, many city and school services were provided to Rochester citizens which could not have been provided by a lesser tax levy. In the same year many of the state's small cities, combined with their school districts, levied property taxes well in excess of the limit imposed on Rochester (see table, pp. 9-10). In those cities also, the determination was

presumably made that the local residents were willing to pay that amount in taxes, in return for the city and school services provided. In small cities such a tax levy is lawful. But as a result of the decision of the state court below, upholding Rochester's tax limit, Rochester has had to roll back its property taxes by approximately $30,000,000. The resulting levy is not only drastically lower than the amount already approved by the City Council, with the mandate of city voters, but also, and more significantly, much lower than the amount which small cities have levied in the past and will be able to continue to levy in the future. That unequal treatment of the City of Rochester and its residents violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.



## POINT I

**Article VIII, Section 10 fails to meet the requirements of the Equal Protection Clause.**

Since the decision in *Mugler v. Kansas*, 123 U.S. 623 (1887), this Court has continued to hold that in the enactment of a law — whether statutory or constitutional[5] — the means chosen by the state to carry out a state power must have a real and substantial relation to a legitimate object which the state intends to further. *Reed v. Reed*, 404 U.S. 71, 76 (1971), citing *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). Under the Equal Protection Clause of the Fourteenth Amendment, classifications made by a state for the purpose of treating people unequally must bear some articulated, rational relationship to a legitimate state purpose. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973); *Reed*, 404 U.S. at 76. Such state legislative classifications must fail if they are arbitrary and without such a rational basis. *Id.* at 76-77.

This equal protection principle has been applied by federal courts to classifications made by a state for tax purposes. In *Hargrave v. Kirk*, 313 F. Supp. 944 (M.D. Fla. 1970) (vacated, sub nom. *Askew v. Hargrave*, 401 U.S. 476 (1971)), the District Court struck down a Florida tax limit classification on equal protection grounds.

This Court vacated that judgment on abstention grounds. The District Court's equal protection analysis was neither approved

---

[5]In ruling upon the constitutionality of a state enactment, this Court has not distinguished state statutes from state constitutions. "With respect to the Equal Protection Clause, it makes no difference whether a state's apportionment scheme is embodied in its constitution or statutory provisions." *Reynolds v. Sims*, 377 U.S. 533, 584 (1964). Provisions of the New York State Constitution have been found invalid in the cases of *WMCA Inc. v. Lomenzo*, 377 U.S. 633 (1964), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966). See also *Carrington v. Rash*, 380 U.S. 89 (1965), invalidating a section of the Texas State Constitution.

nor disapproved by this Court. However, because the tax limit issue involved in *Hargrave* is so closely analogous to the tax limit issue in this case, the District Court's opinion is discussed here as an example of judicial analysis of a very similar equal protection issue. Furthermore, this Court's comments on the summary judgment issue in the *Hargrave* case support the appellants' position that summary judgment was improper in the case at bar, and that a trial is required before it can be determined whether a complicated tax limit system does or does not violate the Equal Protection Clause. 401 U.S. at 478-79.

The issue in the *Hargrave* case was the constitutionality of a state "Millage Rollback Act" which provided that any county which imposed more than 10 mills in *ad valorem* property taxes for educational purposes would not be eligible to receive state minimum funding for support of its education system. When the act went into effect, 24 Florida counties had to roll back their tax levies to the 10-mill limit. The result was a reduction of fifty million dollars in local tax revenues. Furthermore, and more crucial to the *Hargrave* court, the rollback act created inequalities in taxing power among Florida counties, so that one county, by using the 10-mill limit, was able to raise by its own taxes $125.00 per student, while a poorer county could raise only $52.00 per student. Thus the act prevented poor counties from providing from their own taxes the same support for public education which the wealthy counties were able to provide. *Hargrave*, 313 F. Supp. at 947. And, for many counties, the act, in effect, *required* the poorer districts to spend less on education than they had chosen to spend prior to the act.

The *Hargrave* court concluded that there was no rational basis for preventing poorer areas from providing for themselves as good an education for their children as wealthy areas could. *Id.* at 948. The Equal Protection Clause forbids a state from allocating the authority to tax according to a formula based on a jurisdiction's property valuation, when the effects of such a scheme are discriminatory. *Id.* at 949.



The situation in *Hargrave* is similar to that in the case at bar. Although *Hargrave* dealt only with tax levies for education, the analysis is equally valid for the present case, which involves tax levies for general city purposes as well as for education. The citizens of Rochester are prevented, by the more stringent tax limitation imposed upon New York's large cities, from taxing for education and for city services to the same extent as smaller jurisdictions in the state. As stated by the *Hargrave* court:

> The legislature says to a county, 'You may not raise your own taxes to improve your own school system, even though that is what the voters of your county want to do'. We have searched in vain for some legitimate state end for the discriminatory treatment imposed by the Act. *Id.* at 948.

This is the precise situation in the case at bar. The citizens of Rochester, through their elected representatives, approved the 1976-77 tax levy. That level of taxation would be valid and allowable in a city under 125,000, as well as in a town or village. Thus, the scheme of tax limits in Article VIII, Section 10 imposes on Rochester's taxpayers the taxing straitjacket which was found intolerable by the District Court in *Hargrave* under the Equal Protection Clause.[6]

---

[6]Note that the case at bar, like *Hargrave*, raises an equal protection issue which differs from those raised in *Rodriguez* and several state court decisions (E.g. *Serrano v. Priest*, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *Robinson v. Cahill*, 62 N.J. 473 (1973)). Those cases dealt with state-wide equalization of expenditures for education. The case at bar concerns the equalization of local taxing power — what each municipality is allowed to raise through its own local taxes — not the redistribution of tax revenues among the state's jurisdictions. Appellants are not asking for additional state revenues or revenues from other local jurisdictions, but only for equal authority to raise taxes locally.

The *Rodriguez* Court recognized the difference between these types of equal protection claims, and noted specifically that it was not reaching the issue of unequal tax limits. *Rodriguez*, 411 U.S. at 50, n. 107, citing *Hargrave*.

These equal protection principles, applied to state classifications relating to tax revenues, were confirmed by this Court in the case of *Levy v. Parker;* 346 F. Supp. 897 (E.D. La. 1972), *aff'd,* 411 U.S. 978 (1973). The *Levy* case involved a Louisiana statute which provided for the reimbursement by the state to local governments of revenue lost through a homestead tax exemption. However, the state payments to the local governments, under the state statute, were inequitable because they were based on incomparable local tax rates as well as inequitable assessments, which ranged from 5.7% to 24.5% of market value. The result of the state aid scheme was that one county received $35.00 per homestead exemption, while another county received $198.00 per exemption. This inequality was duplicated across the state. 346 F. Supp. at 899-901.

The District Court in *Levy* held that all government action that has arbitrary impact, even though not originally intended, violates the Equal Protection Clause. The court found the revenue sharing scheme, which provided widely differing revenues per capita, to be a wholly arbitrary method of distributing state funds. The *Levy* court said:

> We consider here only the combination of unequal assessments, limitations on the taxing power of a local government, and facially nondiscriminatory payment of state revenues to localities based upon prevailing local millage rates, and we conclude that this scheme of payment is constitutionally infirm as it is applied in fact. 346 F. Supp. at 905.

The *Hargrave* and *Levy* cases show that the Fourteenth Amendment requires that any government-imposed classification, including classifications of local governments, be rational and serve a specific governmental interest. The constitutional rights of local residents cannot be abridged by a state imposing discriminatory restrictions on the local government in which they reside.



### A. *Governmental classifications affecting municipal and educational services require careful scrutiny under the Equal Protection Clause.*

The Equal Protection Clause requires careful scrutiny of the underlying reason for any governmental classification. The almost automatic deference shown in earlier Supreme Court cases to state legislative classifications has evolved into a closer scrutiny by this Court of the actual rationale of the legislature. *Weinberger v. Weisenfeld,* 420 U.S. 636, 648, n.16 (1975). The Court no longer upholds legislative classifications when the only supporting rationale which can be offered is some hypothetical and imaginary state of facts. E.g., *Craig v. Boren,* 429 U.S. 190, 210, n.23 (1976).

In addition, even if a valid rationale existed at one time, a court must look to the current effects of a legislative classification. As this Court stated in the recent case of *Califano v. Goldfarb,* 430 U.S. 199 (1977), some classifications may be revealed on analysis to rest only upon "old notions" and "archaic and over-broad" generalizations, and thus violate the Equal Protection Clause. 430 U.S. at 211. The Court found that Congress had "proceeded casually on a 'then generally accepted' stereotype" which, the Court found, led to an arbitrary classification. *Id.* at 217, n.18.

In both the *Weisenfeld* and *Goldfarb* cases, the Court made a detailed examination of the legislative history of the provisions of the Social Security Act at issue in those cases, and focused on the actual rationale articulated there by the legislature. In *Craig,* the Court made a detailed examination of the current statistical sociological data related to the gender-based classification at issue in that case. The Court found that, though there was some statistical evidence supporting the legislative classification, the evidence was considered an "unduly tenuous 'fit' ". 429 U.S. at 201-02. In all these cases, none of which involved "suspect" classes or "fundamental rights", the Court struck down the challenged classifications, after its searching

inquiry failed to turn up a justification for the classification which was not only plausible, but also both reasonable and based on fact.

In addition to the Court's emphasis on the factual basis for legislative classifications, the Court's recent decisions have modified the "two-tier" approach to equal protection questions, in that the Court now demands a more meaningful and substantive rationality even of classifications which are not "suspect" and thus do not warrant "strict scrutiny". In *Reed v. Reed*, 404 U.S. 71 (1971), a unanimous Court struck down a non-"suspect" state classification, even in the face of plausible reasons for the classification. The Court held that the classification was arbitrary under the Equal Protection Clause because the reasons articulated by the state in support of the classification were not substantially related to the type of classification made. *Id.* at 76-77. Likewise, the *Craig* Court, recognizing the important interests involved, held that:

> To withstand constitutional challenge ... classifications by gender [not a "suspect" class] must serve important governmental objectives and must be substantially related to achievement of those objectives. 429 U.S. at 197.

These cases indicate that all governmental classifications, and especially those which affect important interests, require careful, detailed scrutiny under the Equal Protection Clause.

The interests at stake in this case — education and municipal services — are of crucial importance to the residents of Rochester and New York's other large cities. It is undeniable that education is a necessity in this society and is considered by all citizens to be a basic right. The New York Constitution expressly mandates that the state shall "provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." *N.Y. Constitution*, Art. XI, §1.



In *Brown v. Board of Education of Topeka*, this Court was unanimous in its characterization of education as basic to our way of life. 347 U.S. 483, 493 (1954).

Like education, the right to city services is a basic and high-priority right. Police and fire protection are essential to the physical safety and well-being of residents of all communities. Street construction, maintenance and cleaning, garbage collection, water distribution, public parks — all have come to be accepted as basic amenities of life in today's world. Any restriction on the ability of local governments to provide for their citizens these necessary basic services should be scrutinized most carefully by a court.

The problems associated with urban growth in recent decades have been well publicized: crime, substandard housing, blighted neighborhoods, inadequate street lighting, garbage, rodent control. It is particularly essential that the residents of large cities, where these problems are most acute, not be irrationally deprived of the means for fighting the problems and improving their environment. Businesses and residents who choose to locate in cities, who make the commitment to help preserve cities as viable places to live and work, must be permitted to obtain the municipal services they deem necessary, in return for their tax dollars.

The classifications in issue in this case, by which different municipalities and school districts are given different taxing power, does in fact have the effect of depriving citizens of large cities, such as Rochester, of the right to the same level of city services and public school services as is available to citizens of small cities, towns and villages.[7]

First, as to school services, residents in central school districts, central high school districts, union free school districts, and

[7]The court below noted other taxes authorized in various state laws (A-12). However, these taxes are either state taxes, New York City taxes, or statewide local taxes which do not compensate for the restrictive property tax limit imposed only upon large cities.

common school districts, have no limit at all on the taxes they can raise to pay for the operation of their schools. Each year they vote, at a referendum, on the annual school budget. The voters can weigh for themselves the situation in their district, and whether the particular expenditures proposed in the budget warrant the taxes necessary to pay those expenses. If they feel that a lesser level of expenditure is appropriate, they can turn down the budget until it is reduced to the desired level. If, however, they want to provide more revenue in order to implement more or better programs, they have that option as well. Those resident parents who rate the education of their children as a high priority, if they are a majority in the district, can approve annual school budgets which call for a high level of expenditure, without the constraint of a tax limit.

Residents in city school districts in cities under 125,000 are somewhat more restricted. They have the option of raising the quality of their public school services only so long as the desired expenditures require an annual tax levy not in excess of their tax limit, ranging from 1¼% to 2% of the full valuation of taxable real property in the district. Since the limit can be raised within that range by referendum in the district, if enough of the residents favor higher expenditures and higher taxes, they can by vote raise the limit up to 2%. Thus, small-city residents have available to them that level of public school quality which can be funded from an annual 2% tax levy.

Residents of large-city school districts such as the Rochester City School District are the most restricted of all. Since the 2% tax limit which applies to cities over 125,000 applies not only to the taxes levied to pay for city services, but to the school taxes levied to fund the city school district as well, Rochester residents can obtain only that level of quality of public school services which can be funded from the school portion of the overall 2% limit. In Rochester, by agreement between the City and the School District, that portion is 60%, or a tax limit of 1.2%.



Thus, a very real effect of the system of tax limits in Article VIII, Section 10 is to infringe upon the right of residents of large cities such as Rochester to obtain high-quality education in their public school system.

Secondly, as to municipal services, Rochester residents are again deprived of the ability to obtain the same level of services as residents of other municipalities. Towns have no tax limit; town residents can tax at any level they choose to provide town services. (For example, the highly urbanized Town of Hempstead, N.Y., with 800,000 population — three times the size of Rochester's — has no tax limit.) Villages have a 2% tax limit for village taxes, (which includes no school taxes). Since villages are within towns, village residents can obtain village services up to that level which can be financed by an annual 2% tax levy, and town services at an unlimited level.

Small-city residents, again, are somewhat more restricted. They can obtain that level of city services which can be provided by an annual 2% tax levy.

Residents of large cities such as Rochester are, once more, the most restricted of all. They can provide for themselves only that level of city services which can be financed from the City's portion of the overall 2% city and school tax limit. As Rochester's agreement allocates 40% of the limit to the City, it has an effective 0.8% tax limit for city taxes.

Because of the critical nature of education and municipal services, this Court should look closely at legislative classifications, such as those in Article VIII, Section 10, which affect the ability of local governments to provide those services. The Equal Protection Clause requires that the tax limit classifications be rationally related to a legislative objective. Because of the important interests involved in this case, the rationality of the tax limits and how the tax limits relate to a legislative objective should be required to be clearly demonstrated before judgment is rendered upholding the tax limits.

However, Waldert has not made that showing in this case. Indeed, the following review of the legislative history and the current circumstances relating to the tax limits demonstrates that the tax limit classifications are not rationally related to any legislative objective.

**B. *Legislative History***

As directed by this Court in *Weisenfeld*, it is necessary to examine the actual, articulated, historical basis for the challenged classification, to determine at least what its original justification was. An analysis of the historical and current situations surrounding the system of tax limits in Article VIII, Section 10 demonstrates no viable rationale for the discriminatory tax limits.

The present State Constitution was adopted in 1938; Article VIII, Section 10 provided a system of tax limits on different municipalities. The differentiation between large and small cities in the current version of Article VIII, Section 10 dates back to the 1938 version, in which such a differentiation was also made, although not in the same form as today. The rationale for that distinction had to do with historical differences in the development of school districts in large and small cities.

Under the law at that time, a school district in a city was permitted to annex territory outside, but contiguous to, the city, thereby becoming an "enlarged" district. Any such "enlarged" district was allowed by law to incorporate independently of its city, with independent taxing and borrowing powers. A non-"enlarged" district was operated as a department of the city government. In the period before 1938, many of the school districts in smaller cities took advantage of these provisions, and became "enlarged" and fiscally independent. At that time, there was nothing in the law to prevent large-city school districts from becoming "enlarged" districts, but, for whatever reason, the historical fact is that none of them did. In 1938, all seven of the



school districts in cities over 100,000 were not "enlarged" districts, and were thus not independent of the city governments. *Report of the Constitutional Convention Committee, 1938, Taxation and Finance,* at 238.

The administrative problems of imposing a single tax limit on two overlapping independent tax authorities, such as the "enlarged" city school districts and their cities, were reflected in the language of the 1938 Constitution. Article VIII, Section 10 imposed a 2% tax limit on all cities over 100,000 population, and provided that that limit would be extended to apply to all cities as of 1944. However, there were two provisos in that section which allowed school taxes in certain cities to be excluded from the city's tax limit. One stated that the school taxes of any "enlarged" city school district would be excluded from the city's tax limit automatically, and the other allowed the legislature to exclude all or part of the school taxes in any other city under 100,000 from the city's tax limit. Those exclusions were clearly geared to the dilemma of the fiscally independent "enlarged" city school districts. Those school districts determined their annual tax levies independently of their city governments, and the administration of both the city and the school district would have been hampered if both tax levies had been required to fit under a single tax limit. The effect of the exclusions was that those cities and their school districts could levy their taxes independently, without having to contend over whose levy had to be cut if the limit was exceeded.

In 1949, Article VIII, Section 10 was amended to give all school districts in cities under 125,000 a separate tax limit. Administrative confusion had apparently resulted from having some small-city school districts tied to their cities, as city departments, and some independent of their cities, as "enlarged" districts. In order to unify and simplify school administration, it was proposed to make all school districts in cities under 125,000 fiscally independent. But under the 1938 wording of Article VIII,

Section 10, not all such school districts were independent of their cities' tax limits. In order to accomplish the needed reform of school administration, the constitution was changed in 1949 to give all school districts in cities under 125,000, whether "enlarged" districts or not, a separate tax limit. See Historical Note to Education Law §2501, *McKinney's Cons. Laws* p. 83-84.

Thus, it is crucial to observe that the reason behind the unequal treatment of large and small cities in the 1938 and 1949 versions of Article VIII, Section 10 had to do with solving problems in the administration of school districts, totally unrelated to the taxing or spending needs of large cities versus small cities, or large-city school districts versus small-city school districts.

One way to give small-city school districts an independent tax limit would have been simply to split the previous 2% tax limit in half, and give 1% to the city and 1% to the school district. But that would have worked a hardship on the city or on the school district, whichever had previously been using more than half of the joint tax limit. In order to give uniform, separate limits, without reducing the limit of any city or school district, the city was allowed to keep the same 2% limit as before, although it no longer had to fund its schools, and the school district was given its own limit, ranging from 1¼% to 2%.

The effect of the tax limits as formulated in 1938 and 1949 was to permit dramatically higher city and school taxes in small cities than in large cities. But that discrepancy clearly was not based upon any finding that small cities had any need for or right to greater taxing power than large cities. Rather, it was a by-product of the solution of another problem — the administrative difficulties of "enlarged" and other school districts in small cities. As in the *Goldfarb* case discussed above, where Justice Stevens found that the legislature had never focused on the discrimination created by a legislative classification, the state legislature in this case never focused on the inequality in



local taxing power created by the special treatment accorded small-city school districts. Also as in *Goldfarb*, this legislative classification thus created cannot stand absent a rationale which is reasonably related to a legitimate state purpose.

Unconstitutional discrimination is not justified merely because it solves an administrative problem. It was incumbent upon the legislature in 1949 to preserve the equity between small and large cities when it established independent taxing power for small-city school districts. It could have done that by raising the limit for large cities, or by giving large cities an independent taxing limit for their school taxes. Either way, small-city school districts would have been given fiscal independence without creating an irrational and unconstitutional discrimination between small and large cities. The foregoing historical analysis of the tax limit provisions of Article VIII, Section 10 discloses no rationality behind the discriminatory treatment of large cities which can serve to justify that discrimination under the tests of the Equal Protection Clause.

### C. *Municipal and Educational Overburdens*

Is there some other actual, current reason for allowing residents of small cities and other municipalities to raise more tax dollars for municipal services and for education than large-city residents? Do small cities and other municipalities perhaps have a greater need than large cities for tax dollars in order to carry out their public responsibilities? If that were true, it might serve as at least some rationale, though certainly not articulated anywhere, for the current discriminatory tax limits.

But an examination of the actual situation in large cities as compared with other municipalities proves just the opposite: that the public needs in large cities are, if anything, greater than elsewhere, and that providing equal services costs, if anything, more in large cities than elsewhere.

From an economist's perspective, the consequences of population growth have been described as follows:

> As a city grows in population, land values increase because more people want to locate in the city and hence bid up rents. With higher rents, land use becomes more intensive as inhabitants economize on the use of a more expensive resource. This is another way of saying that urban density will increase ... With rents up, new migrants into an expanding city can be attracted only if they are paid enough to cover the new higher rents, which drives up wages. High rents also imply higher transportation costs, since there is a trade-off between locating at an increasing distance from the center and paying higher commuting costs ... Higher rents or transport costs, or both, cause general increases in the cost of living. Food costs, for example, increase because grocery store rents are higher and because grocery store clerks receive higher wages to cover their higher residential rents. Increased size and density generate congestion and pollution effects; it is often hypothesized that there will be other health and welfare effects that involve increased levels of social disorganization (delinquency, crime, insanity, and the like). Hoch, "City Size Effects, Trends, and Policies", *Science*, Vol 193, p. 856, Sept. 3, 1976.

This circular evolution of growing population, higher costs, and higher wages of course has its effect on city government finances. Tabulating data from nearly all U.S. cities, the Census Bureau has demonstrated that per capita costs of government increase as population increases. (R 132). The special population characteristics of large cities increase the fiscal burdens on large-city governments. For example, although New York's five largest cities, in 1970, contained 50% of the families in the state, they contained 67% of the families living in poverty. Of the families with children under 18, 44% of all such families lived in the largest cities, yet 77% of those families who lived in poverty and which had a female head of household lived in the largest



cities. Table 1[8], (R 128). Similarly, in the Rochester City School District, in 1969, 16.7% of the total enrollment was from families with incomes below the poverty level, while only 6.2% of the enrollment of surrounding school districts was from poverty families. The comparable percentages for Buffalo were 20.5% in the city, and 7.2% in the surrounding area. Table 2, (R 129).

In 1970, the percentage of families receiving public assistance in large cities was 9.3% for Buffalo, 6.7% for Rochester, 9.1% for Syracuse, while outside the state's six largest cities, that figure was only 3%. Table 3, (R 130). A similar trend is seen in crime statistics. In 1970, the crime rates in all of the state's largest cities exceeded crime in surrounding areas, varying from 45% greater in the City of Syracuse, compared to its surrounding area, to 231% greater in the City of Rochester compared to the area around the City. Table 4, (R 131).

The statistic which may explain most of the others, at least in part, is population density. Density in the City of Rochester is 31 times that of the surrounding area. In Syracuse the comparable figure is 43 times. Table 4 (R 131). These statistics demonstrate that inherent in increased population and population density are substantial problems with which city government must deal, and which are insignificant or absent in smaller jurisdictions.

---

[8]The tables referred to, from the City's affidavit (R. 128-31) are as follows:

Table 1: *Selected Poverty Characteristics, 5 Largest Central Cities and Rest of State, 1970.*

Table 2: *Children Enrolled in Public School Grades K-12 in 1970 From Families With Incomes Below Poverty Level in 1969 by Selected Area.*

Table 3: *Selected Socioeconomic and Health Characteristics, Largest Cities and Rest of State, 1970, 1973.*

Table 4: *Selected Demographic and Crime Rate Statistics, 1970, Large New York SMSAs.*

A recent New York case vividly demonstrated the financial burdens which are characteristic of large cities. In *Board of Ed., Levittown Union Free School District v. Nyquist*,[9] No. 8208/74 (Sup. Ct., Nassau Co., June 23, 1978), after 122 days of trial extending over eight months, the court struck down New York's education aid system on equal protection grounds. That holding was based in part on specific findings by the court that the state's large cities, including Rochester, were hampered in their funding of school and city services by "municipal overburdens" and "educational overburdens". On the issue of municipal overburdens, the court found as follows:

> The intervenors presented convincing evidence in painstaking detail to establish that the higher non-educational expenditures in the cities are caused by the compelling, irresistible demands for municipal services that the urban environment and its characteristics create .... (slip op. at 45.)
>
> The conditions, characteristics and circumstances found in New York City were shown to be replicated in the three upstate cities [including Rochester]. Concentrations of the poor and the elderly, large numbers of persons on public assistance rolls, high levels of unemployment and low education levels have all combined to increase municipal expenditures. To the foregoing must be added the cost-producing factors of old housing stock, deteriorating municipal facilities and a severe economic decline in recent years. As the findings of fact show in more detail, when individual categories of non-educational municipal services are examined, the cities necessarily spent more than other areas of the State .... *Id.* at 46-47.
>
> The defendants did not present evidence contradicting the contention and proof of the intervenors that they had

[9]The Rochester Board of Education, along with the New York, Buffalo, and Syracuse boards, among others, were plaintiff-intervenors in this case. One copy of this opinion, as yet unreported, has been submitted to this Court.



> greater non-educational costs which diminished the extent of tax resources available to finance education. It was only the claim of the intervenors that such non-educational costs were inexorable that the defendants sought to disprove. The effort in that direction, however, was limited to evidence that audits by the office of the Comptroller of the State of New York had been critical of a portion of health and welfare expenditures in the City of New York. The defendants' witness, Netzer, while expressing the opinion that many of the cities' non-educational expenditures were not inexorable failed to undergird that opinion by showing how the cities could appreciably effect a reduction in those expenditures. *Id.* at 50.

In addition, the *Levittown* court found that extensive "educational overburdens" impaired the ability of large cities to adequately fund their school systems. These educational overburdens included a higher incidence of students' impaired learning readiness and impaired mental, emotional, and physical health, greater numbers of handicapped students and foreign language-speaking students, high student absenteeism (resulting in less state aid), and inadequate resources to deal with these problems (*Id.* at 67-77). The court further found that:

> Other factors have made it necessary for city school districts to pay higher salaries than in suburban and rural districts. The large urban school districts have had to pay more to maintain the level of teacher quality in the face of hiring competition from other school districts. Contributing to this have been such considerations as the need to teach large classes having a high percentage of disadvantaged pupils; the need to perform teaching assignments with inadequate materials and supplies in deteriorating buildings; and the anxiety produced by the violence and vandalism in many city schools. *Id.* at 53.

These findings of fact in the *Levittown* case support appellants' contentions that municipal and educational overburdens exist in the state's large cities, including Rochester, and

that these cities therefore require at least as much taxing power as the state's other municipal jurisdictions.

Clearly, then, the discriminatory scheme of tax limits in Article VIII, Section 10 cannot be justified on the basis of the taxing needs of the classified jurisdictions. Large cities, with the largest need for tax dollars, are given the lowest overall tax limit. Smaller cities and other municipalities, with a generally lesser need for tax dollars, are given a higher tax limit. Such a system, appellants submit, does not meet the requirements of rationality under the Equal Protection Clause.

### D. *Conclusion*

Statutory classifications such as those in Article VIII, Section 10, must be rationally related to a legitimate state purpose. The preceding discussion of both the history and the current conditions related to the tax limits shows no rational basis for applying the limits so unequally. Furthermore, in this case, Waldert has not brought forth evidence of any such rationality.

These facts in this case remain uncontroverted:

> The residents of Rochester require at least as much taxing power as the residents of smaller jurisdictions to provide basic municipal and school services;
>
> The residents of Rochester and other large cities have substantially less taxing power, under Article VIII, Section 10, than the residents of other jurisdictions have.

No interpretation of these facts furnishes a rational basis — the minimal rationality required by the Equal Protection Clause — for the discriminatory classification in Article VIII, Section 10. Therefore, on the record in this case, summary judgment upholding the classifications in Article VIII, Section 10 should not have been granted.



### E. *The equal protection analysis by the courts below was inadequate*

The foregoing discussion details appellants' analysis of the applicability of the Equal Protection Clause to the system of tax limits in Article VIII, Section 10. Appellants submit that the courts below failed to deal adequately with the equal protection issue and that their holdings are not supportable under this Court's pronouncements on equal protection.

In support of its holding on the equal protection issue, the Appellate Division below cited only one case: *Magoun v. Illinois Trust & Savings Bank*, 170 U.S. 283 (1898) (R 35). No more recent Supreme Court cases were cited; no New York cases were cited. The Court of Appeals, affirming the Appellate Division, made no reference at all to the equal protection issue. As discussed above, this Court has unequivocally repudiated such automatic deference to legislative classifications.

This Court has recently criticized an Illinois Supreme Court decision for its cursory analysis of equal protection issues.

> [T]he Equal Protection Clause requires more than the mere incantation of a proper state purpose . . . As we said in *Lucas*, the constitutionality of this law "depends upon the character of the discrimination and its relation to legitimate legislative aims." 427 U.S. at 504. The Court below did not address the relation between [the statute] and the promotion of [the asserted legislative goal], thus leaving the constitutional analysis incomplete. *Trimble v. Gordon*, 430 U.S. 762, 769 (1977).

Appellants submit that the brief analysis by the courts below does not constitute the type of searching equal protection analysis required by recent Supreme Court decisions such as *Trimble, Weisenfeld, Goldfarb* and *Craig*.

Also, the courts below gave no consideration to the possibility of less objectionable alternatives to the existing system of tax limits. See *Trimble*, 430 U.S. at 770-71. Tax limits could be

drawn which do not broadly discriminate between large-city residents and residents of other municipalities.

In summary, appellants submit that the equal protection analysis by the courts below was inadequate. This Court has made it clear that a court's equal protection analysis must include a thorough investigation into legislative classifications and their asserted purposes. As the Court said in *Trimble*, "mere incantations" of a proper state purpose or of a time-honored statute are not a sufficient basis for upholding a statute under the Equal Protection Clause.

As the constitutional analysis in the courts below was inadequate, this Court should reverse the summary judgment granted below, and remand for a proper factual inquiry and analysis.

## POINT II

**This Court should reverse the granting of summary judgment to appellee Waldert because there are triable issues of fact.**

New York Civil Practice Law and Rules §3212(b) states that:

> Except as provided in subdivision (c) of this rule a motion [for summary judgment] shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.

Where the court entertains any doubt as to whether any material and triable issue of fact exists, summary judgment will be denied. 4 Weinstein, Korn, Miller, *New York Civil Practice* §3212.05(c).

In particular, summary judgment is likely to be inappropriate in cases involving government financing because of the relatively complex fact situations involved. *Askew v. Hargrave*, 401 U.S. 476, 479 (1971).



> Since the manner in which the program operates may be critical in the decision of the equal protection claim, that claim should not be decided without fully developing the factual record at a hearing. *Id.* at 479.

In the case at bar, there are material and triable issues of fact. In its affidavit opposing Waldert's motion for summary judgment, the appellant City of Rochester presented statistical data which demonstrates that it is irrational for the taxing power of large cities to be more restricted than the taxing power of small cities and other municipal jurisdictions. This data has been summarized in this jurisdictional statement, under Point I. The data indicates that large cities have public needs at least as great as those of other municipal jurisdictions. Therefore, it is arbitrary and without rational basis to classify jurisdictions so that the large cities have less taxing power than smaller jurisdictions.

The data that appellants have offered to support this conclusion has not in any way been refuted by Waldert. Waldert relies only on the legal conclusion that the classifications in Article VIII, Section 10 are permissible (R 105-06). Such unsupported assertions are inadequate to rebut appellants' factual showing. In a summary judgment motion, the moving party must present evidentiary facts clearly showing the validity of his cause of action and that a defense cannot be sustained, as a matter of law. 4 *Weinstein*, at 32-142.36. It was mandatory upon appellee Waldert to submit evidentiary facts or materials, by affidavit or otherwise, rebutting appellants' prima facie factual showing. *Indig v. Finklestein*, 23 N.Y. 2d 728, 729 (1968). *Bachrach v. Farben Fabriken Bayer AG*, 36 N.Y.2d 696, 697 (1975).

The Appellate Division below stated that it could not say that the tax limit classifications were "irrational or without a reasonable basis in fact" (R 34-35); the Court of Appeals, affirming the Appellate Division, made no reference to this issue.

However, it is just this "basis in fact" which should be investigated in this case. It was anomalous for the Appellate Division to hold that there is a factual basis for the rationality in the tax limits while, at the same time, holding that no trial was necessary — even though there has been no factual showing on this issue by Waldert. The facts in the record on the history and on the current effects of the tax limits support appellants' position that the tax limits are arbitrary and irrational. (R 133-39). Appellants submit that the courts below erred when they adopted a simple legal conclusion in deciding the equal protection issue and disregarded the considerable factual showing by appellants and appellants' argument that, on this complex issue, a trial is required.

Any doubt concerning whether there are triable issues of fact in this case was resolved by the *Levittown* case.[10] That case, like the case at bar, revolved around the relative tax burdens and taxing power of New York's local governments (slip op. at 7-8, 93-102). The parties in that case required 122 days of trial extending over eight months, with more than 23,000 pages of testimony, to present their evidence on these issues. *Id.* at 11. The *Levittown* case thus is aligned with this Court's view that issues of governmental financing are likely to be factually complex and, therefore, should not be decided "without fully developing the factual record at a hearing". *Hargrave*, 401 U.S. at 479.

In addition, as discussed under Point I, the *Levittown* court's findings support many of the appellants' substantive contentions in this case. Thus, not only does *Levittown* demonstrate that the issues in this case are factually complex, but also that the evidence at a trial would support the appellants' case. Ap-

[10] *Board of Ed., Levittown Union Free School District, et al. v. Nyquist, et al.*, No. 8208/74, (Sup. Ct., Nassau Co., June 23, 1978).



pellants submit that, especially in light of the *Levittown* decision, summary judgment to Waldert should be reversed.

Respectfully submitted,

LOUIS N. KASH, ESQ.
Corporation Counsel
*Attorney for Appellants*
30 Church Street
Rochester, New York 14614
(716) 428-6986

# APPENDIX

# THE CONSTITUTION OF THE STATE OF NEW YORK, ARTICLE VIII, SECTION 10

§10. **[Limitations on amount to be raised by real estate taxes for local purposes; exceptions.]** — Hereafter, in any county, city, village or school district described in this section, the amount to be raised by tax on real estate in any fiscal year, in addition to providing for the interest on and the principal of all indebtedness, shall not exceed an amount equal to the following percentages of the average full valuation of taxable real estate of such county, city, village or school district, less the amount to be raised by tax on real estate in such year for the payment of the interest on and redemption of certificates or other evidence of indebtedness described in paragraphs A and D of section five of this article, or renewals thereof:

(a) any county, for county purposes, one and one-half per centum; provided, however, that the legislature may prescribe a method by which such limitation may be increased to not to exceed two per centum;

(b) any city of one hundred twenty-five thousand or more inhabitants according to the latest federal census, for city purposes, two per centum;

(c) any city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for city purposes, two per centum;

(d) any village, for village purposes, two per centum;

(e) any school district which is coterminous with, or partly within, or wholly within, a city having less than one hundred twenty-five thousand inhabitants according to the latest federal census, for school district purposes, one and one-quarter per centum; provided, however, that if the taxes subject to this limitation levied for any such school district for its first fiscal year beginning on or after July first, nineteen hundred forty-

seven, were in excess of one and one-quarter per centum but not greater than one and one-half per centum, then for such school district the limitation shall be one and one-half per centum; or if such taxes were in excess of one and one-half per centum but not greater than one and three-quarters per centum for such fiscal year, than for such school district the limitation shall be one and three-quarters per centum; or if such taxes were in excess of one and three-quarters per centum for such fiscal year, then for such school district the limitation shall be two per centum. The limitation herein imposed for any such school district may be increased by the approving vote of sixty per centum or more of the duly qualified voters of such school district voting on a proposition therefor submitted at a general or special election. Any such proposition shall provide only for an additional one-quarter of one per centum in excess of the limitation applicable to such school district at the time of submission of such proposition. When such a proposition has been submitted and approved by the voters of the school district as herein provided, no proposition for a further increase in such limitation shall be submitted for a period of one year computed from the date of submission of the approved proposition, provided that where a proposition for an increase is submitted and approved at a general election or an annual school election, a proposition for a further increase may be submitted at the corresponding election in the following year. The legislature shall prescribe by law the qualifications for voting at any such election. In the event any such school district shall be consolidated with any one or more school districts, the legislature shall prescribe a limitation, not exceeding two per centum, for such consolidated district. Thereafter, such limitation may be increased as provided in this sub-paragraph (e). In no event shall the limitation for any school



district or consolidated school district described in this sub-paragraph (e) exceed two per centum.

The average full valuation of taxable real estate of such county, city, village or school district shall be determined by taking the assessed valuations of taxable real estate on the last completed assessment rolls and the four preceding rolls of such county, city, village or school district, and applying thereto the ratio which such assessed valuation on each of such rolls bears to the full valuation, as determined by the state tax commission or by such other state officer or agency as the legislature shall by law direct. The legislature shall prescribe the manner by which such ratio shall be determined by the state tax commission or by such other state officer or agency.

Nothing contained in this section shall be deemed to restrict the powers granted to the legislature by other provisions of this constitution to further restrict the powers of any county, city, town, village or school district to levy taxes on real estate.

(f) Notwithstanding the provisions of sub-paragraphs (a) and (b) of this section, the city of New York and the counties therein, for city and county purposes, a combined total of two and one-half per centum.

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

STATE OF NEW YORK – COURT OF APPEALS

JEANNETTE C. WALDERT,

*Plaintiff-Appellee,*

*—vs—*

CITY OF ROCHESTER,

*Defendant-Appellant,*

THOMAS R. FREY,

*Intervenor-Appellant.*

Index # 15237/76

Notice is hereby given that the defendant-appellant City of Rochester, and the intervenor-appellant Thomas R. Frey, hereby appeal to the Supreme Court of the United States from that portion of the final order and judgment of the Court of Appeals of the State of New York, entered in the Court of Appeals on June 8, 1978, modifying and affirming the order and judgment of the Appellate Division of the Supreme Court, Fourth Department, granting summary judgment to the plaintiff-appellee Jeannette Waldert upholding the validity of Article VIII, Section 10, of the New York Constitution under the Fourteenth Amendment to the United States Constitution, and awarding a real property tax refund to the plaintiff-appellee.

This appeal is taken pursuant to 28 U.S.C. §1257 (2).

Dated: June 14, 1978

/s/ LOUIS N. KASH
Louis N. Kash
CORPORATION COUNSEL
ATTORNEY FOR APPELLANTS
CITY HALL
30 CHURCH STREET
ROCHESTER, NEW YORK 14614



*Notice of Appeal to the Supreme Court of the United States*

FILED
'78 JUN 15 PM 2:08
MONROE CO.
CLERK'S OFC.

TO: THE CLERK OF THE COURT OF APPEALS
COURT OF APPEALS OF THE
STATE OF NEW YORK
20 EAGLE STREET
ALBANY, NEW YORK 12207

THE CLERK OF MONROE COUNTY
COUNTY OFFICE BUILDING
ROCHESTER, NEW YORK 14614

JOHN VAN VOORHIS, ESQ.
ONE GRAVE STREET
ROCHESTER, NEW YORK 14614

CERTIFICATE OF SERVICE

STATE OF NEW YORK – COURT OF APPEALS

JEANNETTE C. WALDERT,

*Plaintiff-Appellee,*

*—vs—*

CITY OF ROCHESTER,

*Defendent-Appellant,*

THOMAS R. FREY,

*Intervenor-Appellant.*

STATE OF NEW YORK
COUNTY OF MONROE SS:
CITY OF ROCHESTER

Louis N. Kash, being duly sworn, says that he is over twenty-one years of age; that deponent served the within Notice of Appeal to the Supreme Court of the United States on John VanVoorhis, Esq., the attorney for the plaintiff-appellee therein named, on the 14th day of June, 1978, by depositing the same properly and securely enclosed in a sealed wrapper, with full postage prepaid thereon, in a post office box regularly maintained by the government of the United States, and under the care of the post office, at the City Hall of Rochester, New York, directed to said attorney at One Graves Street, Rochester, New York 14614, that being the address designated by him for that purpose upon the preceding papers in the within-entitled action, and the place where he keeps an office, and between which place there then was and now is a regular daily communication by mail. By this act, all parties required to be served have been served.

/s/ LOUIS N. KASH
Louis N. Kash





Sworn to before me this
14th day of June, 1978.
/s/ PATRICIA A. PUFFER

PATRICIA A. PUFFER
Notary Public in the State of New York
MONROE COUNTY, N.Y.
Commission Expires March 30, 1980

STATE OF NEW YORK, COUNTY OF MONROE ss:

I, F. ROSS ZORNOW, Clerk of the County of Monroe of the County Court of said County and of the Supreme Court both being Courts of Record having a common seal

DO HEREBY CERTIFY That I have compared this copy with the original filed or recorded in this office and that the same is a correct transcript thereof and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said County and Courts on Jun 23, 1978.

F. Ross Zornow

Facsimile signature used pursuant to Sec. 903 of County Law.

FILED
'78 JUN 15 PM 2:08
MONROE CO.
CLERKS OFC.

## REMITTITUR

COURT OF APPEALS
STATE OF NEW YORK
The Hon. Charles D. Breitel, Chief Judge, Presiding

No. 299

Jeannette C. Waldert,

*Respondent-Appellant,*

*vs.*

City of Rochester,

*Appellant-Respondent,*

and Thomas R. Frey,

*Intervenor-Appellant-Respondent,*

Hon. Louis J. Lefkowitz, Attorney General of the State of New York,

*Intervenor.*

---

The appellant-respondent and the intervenor-appellant-respondent in the above entitled appeal appeared by Louis N. Kash, Corporation Counsel of the City of Rochester; the respondent-appellant appeared by Van Voorhis and Van Voorhis; and Louis J. Lefkowitz, Attorney General of the State of New York appeared pursuant to Executive Law § 71, and this Court's order of April 27, 1978.

The court, after due deliberation, on May 9, 1978, having determined that the order of the Appellate Division, Fourth Department, entered January 28, 1978, should be modified, and chapter 349 of the Laws of 1976, as amended by chapter 485 of the Laws of 1976, declared unconstitutional, and having directed that the proposed remittitur be settled on 20 days' notice in a unanimous opinion *Per Curiam;*



*Remittitur*

The court, after further due deliberation of written submissions of the parties, orders and adjudges:

That the order of the Appellate Division, Fourth Department, be modified, by reinstating the judgment and supplemental judgment of the Special Term of the Supreme Court of the State of New York, held in and for Monroe County, granting to Jeannette C. Waldert recovery from the City of Rochester of the sum of $3,451.19, together with interest, and, as so modified, affirmed, with costs and disbursements to Jeannette C. Waldert to be taxed by the Monroe County Clerk against the City of Rochester;

That chapter 349 of the Laws of 1976, as amended by chapter 485 of the Laws of 1976, be declared unconstitutional;

That this remittitur and the relief accorded herein are effective immediately.

The court further orders that the papers required to be filed and this record of the proceedings in this court be remitted to the Supreme Court, Monroe County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

/s/ JOSEPH W. BELLACOSA,
Joseph W. Bellacosa, Clerk of the Court

Court of Appeals, Clerk's Office, Albany, June 8, 1978.

## OPINION BELOW

Bethlehem Steel Corporation, Respondent, v Board of Education of the City School District of Lackawanna et al., Appellants; Louis J. Lefkowitz, as Attorney-General of the State of New York, Intervenor.

Jean W. Jones et al., Respondent-Appellants, v City School District of the City of Geneva, Appellant-Respondent; Louis J. Lefkowitz, as Attorney-General of the State of New York, Intervenor.

Jeannette C. Waldert, Respondent-Appellant, v City of Rochester, Appellant-Respondent; Thomas R. Frey, Intervenor-Appellant-Respondent; Louis J. Lefkowitz, as Attorney-General of the State of New York, Intervenor.

Argued May 2, 1978; decided May 9, 1978; remittiturs signed June 8, 1978

### APPEARANCES OF COUNSEL

*John J. Olszewski* and *Peter A. Vinolus* for appellants in the first above-entitled action.

*Albert E. Bond* for appellant-respondent in the second above-entitled action.

*Louis N. Kash, Corporation Counsel (Susan L. Hauser* and *Barry C. Watkins* of counsel), for appellant-respondent in the third above-entitled action.

*David K. Floyd* and *David Alan Sands* for respondent in the first above-entitled action.

*John Van Voorhis* for respondents-appellants in the second and third above-entitled actions.

*Louis J. Lefkowitz, Attorney-General (Jean M. Coon* and *Ruth Kessler Toch* of counsel), in his statutory capacity under section 71 of the Executive Law.



*Opinion Below*

*Harry Treinin* for City School District of City of Corning, *amicus curiae.*

*Joseph P. McNamara, Corporation Counsel of City of Buffalo (Stanley A. Moskal, Jr.,* of counsel), *amicus curiae.*

### OPINION OF THE COURT

*Per Curiam.*

For the reasons expressed in the opinion of Mr. Justice Stewart F. Hancock, Jr., at the Appellate Division, chapters 349 (as amd by ch 485) and 484 of the Laws of 1976, insofar as it assigns a period of probable usefulness to the cost of current health and dental insurance coverage, are declared unconstitutional in their entirety. The challenged legislation, including the alternative State Real Property Tax Act (L 1976, ch 349, §3), presents nothing more than an attempt to circumvent the constitutional limitation upon the amount of revenue that may be raised by local subdivisions of the State through the taxation of real property. (NY Const, art VIII, §10.) On a previous occasion, this court has been constrained to strike down legislative measures in palpable evasion of those constitutional provisions designed to limit the taxing powers of local subdivisions of the State. (*Hurd v City of Buffalo,* 34 NY2d 628, 629, affg 41 AD2d 402.) For present purposes, chapters 349 and 484 of the Laws of 1976 are indistinguishable from the legislation struck down as unconstitutional in *Hurd (supra).* We would further add that section 7 of chapter 349, which purports to restrict the judicial authority to fashion remedies, constitutes a patently unconstitutional infringement on the powers of the judiciary.

In holding this legislation unconstitutional, we reject, as did the Appellate Division, defendants' contention that the fiscal crisis presently encountered by cities and school districts con-

stitutes an emergency justifying suspension of constitutional limitations pursuant to the emergency clause in the State Constitution. (NY Const, art III, §25.) Certainly, the present fiscal hardship, grave as it is, cannot seriously be equated with the emergencies contemplated in the Constitution: that is, enemy attack or other forms of disaster. (See *Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d 731, 740.) Thus, in holding unconstitutional the New York State Emergency Moratorium Act for the City of New York (L 1975, ch 874, as amd by L 1975, ch 875), we stated that the consequences of that legislation could "not be justified by fugitive recourse to the police power of the State or to any other constitutional power to displace inconvenient but intentionally protective constitutional limitations." (*Flushing Nat. Bank v Municipal Assistance Corp. for City of N. Y.*, 40 NY2d, at p 736.)

The State is not confronted with a situation in which it has no choice but to provide additional revenues for local government through the imposition of real property taxes in excess of the constitutional limitation. Obviously, real property taxes are not the only source of revenue available to support local subdivisions. Revenue for local subdivisions can be, and is, generated through various alternate vehicles.*

While we agree with the Appellate Division's affirmance of the judgments of Special Term declaring chapters 349 and 484 of the Laws of 1976 unconstitutional, we disagree with its conclusion that the plaintiffs in Jones v City School Dist. of Geneva and Waldert v City of Rochester are not entitled to repayment of

*See e.g., Tax Law, art 29, Taxes Authorized for Cities, Counties and School Districts; New York Lottery for Education (Tax Law, art 34); Corporation Tax (Tax Law, art 9); Franchise Tax on Business Corporations (Tax Law, art 9-A); Estate Tax (Tax Law, art 10-B); Mortgage Tax (Tax Law, art 11); Real Estate Transfer Tax (Tax Law, art 31); Stock Transfer Tax (Tax Law, art 12); Gasoline Tax (Tax Law, art 12-A); Alcoholic Beverages Tax (Tax Law, art 18); Cigarette and Tabacco Tax (Tax Law, art 20); Personal Income Tax (Tax Law, art 22); Highway Use Tax (Tax Law, art 21); Gift Tax (Tax Law, art 26-A); Sales and Use Taxes (Tax Law, art 28).



the taxes paid in excess of the tax limitation provided in the Constitution. Although in *Hurd (supra)* plaintiffs' award was limited to prospective relief because of their reliance upon the invalidated legislation in preparation of their budgets, the same rationale can no longer be applicable today. In view of *Hurd (supra)*, local subdivisions were put on notice that patent circumvention of constitutional limitations on their taxing powers would not be tolerated. Similarly, we believe that the plaintiff in Bethlehem Steel Corp. v Board of Educ. is entitled to establish its rights to repayment of real property taxes paid excess of the constitutional limitation if such taxes were paid under appropriate protest.

Accordingly, the order of the Appellate Division in Bethlehem Steel Corp. v Board of Educ. should be affirmed, with costs, and the orders of the Appellate Division in Jones v City School Dist. of City of Geneva and Waldert v City of Rochester should be modified, with costs, to reinstate the judgments of Special Term granting petitioners a tax refund, and, as so modified, affirmed. Chapters 349 and 484 of the Laws of 1976 are declared unconstitutional, and the proposed remittitur settled on 20 days' notice.

Chief Judge Breitel and Judges Jasen, Gabrielli, Jones, Wachtler, Fuchsberg and Cooke concur in *Per Curiam* opinion.

In *Bethlehem Steel Corp. v Board of Educ. of City School Dist. of Lackawanna:* Order affirmed, with costs, proposed remittitur to be settled on 20 days' notice.

In *Jones v City School Dist. of City of Geneva:* Order modified, with costs to plaintiffs, in accordance with the opinion herein and, as so modified, affirmed. Proposed remittitur to be settled on 20 days' notice.

In *Waldert v. City of Rochester:* Order modified, with costs to plaintiff, in accordance with the opinion herein and, as so modified, affirmed. Proposed remittitur to be settled on 20 days' notice.

In The

# Supreme Court of the United States

October Term, 1978

No. 78-386

JEANETTE C. WALDERT,

*Plaintiff-Appellee,*

*v.*

CITY OF ROCHESTER,

*Defendant-Appellant,*

*and*

THOMAS R. FREY,

*Intervenor-Defendant-Appellant.*

**On Appeal From The Court of Appeals Of The State of New York**

## BRIEF FOR PLAINTIFF-APPELLEE ON HER MOTION TO DISMISS THE APPEAL UNDER SUPREME COURT RULE 16(b) ON THE GROUND THAT IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

VAN VOORHIS & VAN VOORHIS
*Attorneys for Plaintiff-Appellee*
One Graves Street
Rochester, New York 14614
Telephone: (716) 232-4221

John Van Voorhis, Esq.
*Of Counsel*

Daily Record Corporation
Rochester, New York

(4173)

Spaulding Law Printing
Syracuse, New York

## TABLE OF CONTENTS

**Table of Authorities**

***Constitutional References:***



***New York State Constitution***







***Statutory References:***



***Other References:***

In The

# Supreme Court of the United States

October Term, 1978

No. 78-386

JEANETTE C. WALDERT,

*Plaintiff-Appellee,*

*v.*

CITY OF ROCHESTER,

*Defendant-Appellant,*

*and*

THOMAS R. FREY,

*Intervenor-Defendant-Appellant.*

**On Appeal From The Court of Appeals Of The State of New York**

## BRIEF FOR PLAINTIFF-APPELLEE ON HER MOTION TO DISMISS THE APPEAL UNDER SUPREME COURT RULE 16(b) ON THE GROUND THAT IT DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The nature of this action and its history in the New York State Courts are set forth in the Jurisdictional Statement filed by appellants September 6, 1978. This appeal is taken by the City of Rochester and intervenor-appellant Thomas R. Frey from an

order and judgment of the Court of Appeals of the State of New York which stated in its Per Curiam opinion that

> "For the reasons expressed in the opinion of Mr. Justice STEWART F. HANCOCK, Jr., at the Appellate Division, chapters 349 (as amd by ch. 485) and 484 of the Laws of 1976, insofar as it assigns a period of probable usefulness to the cost of current health and dental insurance coverage, are declared unconstitutional in their entirety. The challenged legislation, including the alternative State Real Property Tax Act (L. 1976, ch. 349, §3), presents nothing more than an attempt to circumvent the constitutional limitation upon the amount of revenue that may be raised by local subdivisions of the State through the taxation of real property (NY Const, Art. VIII, §10). On a previous occasion, this court has been constrained to strike down legislative measures in palpable evasion of those constitutional provisions designed to limit the taxing powers of local subdivisions of the State. (*Hurd* v. *City of Buffalo*, 34 N.Y. 2d 628, 629, affg 41 A.D. 2d 402). For present purposes, chapters 349 and 484 of the Laws of 1976 are indistinguishable from the legislation struck down as unconstitutional in *Hurd* (*supra*)." (44 N.Y. 2d 831, 834).

The opinion by the Appellate Division, which was approved by the New York Court of Appeals, is reported at 61 AD2d 147 (1978).

Appeals to the New York State appellate courts were taken by school districts in two other actions, which involved the constitutionality of the same legislation held to be in violation of the New York State constitutional tax limits, which were argued together along with the appeals in the instant case and decided simultaneously therewith by the Appellate Division and by the Court of Appeals. In neither of those other actions did the school districts contest the validity of the New York State constitutional tax limitations, and neither has sought review by the Supreme Court of the United States.



The City of Rochester, supported by Thomas R. Frey as a taxpayer, are the only parties in these litigations that have appealed to this Court or who have taken the position that these tax limits violate the equal protection or due process provisions of the Fourteenth Amendment to the Constitution of the United States. If these State constitutional tax limitations are invalid for lack of uniformity, as contended by the Rochester Corporation Counsel, so also are the debt limits prescribed by Article VIII, §4 of the New York State Constitution, which would be subject to the same infirmity if the Rochester contentions regarding the tax limits were to be sustained.

**All State Questions Have Been Finally Decided Adversely To Appellants.**

All State questions have been disposed of by the New York State courts which have at all three levels and without a dissenting vote determined that these State statutes violate the provisions of Article VIII, §10 of the New York State Constitution (90 Misc. 2d 472 (1977); 61 A.D. 2d 147 (1978); 44 N.Y. 2d 831 (1978). Reargument was denied by the Court of Appeals September 1, 1978 (See copy of order attached). This disposes with finality of all contentions made by the defendants that Article XI, §1 of the New York State Constitution takes precedence over the tax limit prescribed by Article VIII, subdivision 10 insofar as the former directs that the Legislature shall provide for the maintenance and support of a system of free common schools. It likewise finally disposes of all other State questions such as that the State constitutional tax limit is nullified by the due process or equal protection clauses contained in the New York State Constitution.

**No Substantial Federal Question Is Involved.**

The absence of any substantial Federal constitutional question is conclusively shown, we respectfully submit, by the decision in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1 (1973).

The alleged Federal question whether the New York State tax (and debt) limits are nullified by the Fourteenth Amendment was carefully considered and disposed of at each State court level as follows:

> Livingston, J. at Special Term (pages 480-481 of 90 Misc. 2d):
>
> "If section 10 of article VIII of the New York State Constitution is held to be in conflict with the Federal Constitution on the ground that there is no rational, articulate basis for the tax limits as they now exist, then this would deny equal protection because the classifications are arbitrary. For me to hold that this section is unconstitutional and in conflict with the Fourteenth Amendment would emasculate all of New York State's tax and debt limits. This I am not about to do. The differences between the debt limits in school districts in cities of over 125,000 and under 125,000 population represents a matter of public policy which was settled when the New York State Constitution was adopted by the people.
>
> "Therefore, I honor the statements made in the brief submitted by plaintiff's counsel in the Waldert action on pages 5 and 6 which say: 'In no instance have we been able to discover a decision invalidating a constitutional provision of a state upon the ground that different limitations were enacted in the case of different classifications of municipalities or political subdivisions based on differences in population, location, area or other reasons of local importance. To be sure "if a state tax, it must be uniform all over the state. If a county or city tax, it must be uniform throughout such county or city" (*Township of Pine Grove* v. *Talcott*, 19 Wall. 666, 675). But mathematical symmetry between units of government is not required and would be unattainable. As was said in *Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283 at page 296: "There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things." ' (See *Bell's Gap R.R. Co.* v. *Pennsylvania*, 134 U.S. 232; *People ex rel. Armstrong* v. *Warden*, 183 N.Y. 223, 225-226; *Chisena* v. *Central High School Dist. No. 2 of Towns of Hempstead & North Hempstead*, 136 N.Y.S.2d 598, 606-607). Thus the sixth defense in my opinion is not justiciable."



> Appellate Division, Fourth Department (page 164 of 61 App. Div. 2d):
>
> "The City of Rochester's argument that section 10 of article VIII is in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution because its tax limitations are founded on unlawful and suspect classifications is without merit. The classifications based on the size and nature of the municipalities and school districts set forth in section 10 cannot be said to be of the 'suspect' type such as those involving race, national origin, religion, or sex where the burden is cast upon the party relying on the provision to justify its constitutionality. (See *Califano* v. *Goldfarb*, 430 U.S. 199; *Craig* v. *Boren*, 429 US 190; *Weinberger* v. *Wiesenfeld*, 420 US 636; *Frontiero* v. *Richardson*, 411 U.S. 677; *Reed* v. *Reed*, 404 U.S. 71.)
>
> "We cannot say that such classifications, under which the counties, cities, villages, school districts, and the State have operated and on which they and the taxpayers have relied for almost 100 years, are irrational or without a reasonable basis in fact. As stated in *Magoun* v. *Illinois Trust & Sav. Bank* (170 US 283, 296): 'There is therefore no precise application of the rule of reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there

cannot be an exact exclusion or inclusion of persons and things.'

"In view of the strong presumption of constitutionality that must attach to section 10 of article VIII, under these circumstances, we hold that the provision is constitutional and reject appellant's argument that there are questions of fact presented in the record which require a hearing on the issue."

The Jurisdictional Statement saying on page 8 that the New York Court of Appeals was silent on the equal protection issue is incorrect. The Court of Appeals adopted the reasoning of the Appellate Division on this point without further comment by stating:

> *"For the reasons expressed in the opinion of Mr. Justice STEWART F. HANCOCK, Jr., at the Appellate Division,* chapters 349 (as amd by ch. 485) and 484 of the Laws of 1976, insofar as it assigns a period of probable usefulness to the cost of current health and dental insurance coverage, are declared unconstitutional in their entirety." (page 834 of 44 N.Y. 2d, emphasis supplied).

**The New York State Constitutional Tax Limits Are Presumed To Be Rational and Valid.**

The position taken on behalf of the City of Rochester on this appeal is dependent upon the city's position that the rationality of different constitutional tax limitations applicable to different types or units of government in the same state is not presumed, under the traditional principles of constitutional law, but that the burden is upon any taxpayer who invokes the tax limitation provisions in the New York State Constitution of justifying its existence before he can rely upon it as a basis for relief (e.g. Rochester Brief in the N.Y. Court of Appeals, p. 37).

There is a marked difference between the "suspect" type of classification between situations where there could not possibly have been any basis for distinction except one which is impermissible, such as those based on race, national origin, religion or sometimes sex or legitimacy, where the burden is cast upon the party relying upon the statute to justify its constitutionality,* and tax situations such as the ones at bar where there may well have been any number of reasons for imposing different tax limits on different units of government even though some units are overlapping and some not covered. The courts are not bound by counsel's version of how or why subdivision 10 of article VIII of the New York State Constitution came to be drawn in the way in which it was.



The case of *San Antonio School District* v. *Rodriguez,* 411 U.S. 1 (1973), *supra,* completely refutes the argument made for the City of Rochester that in situations such as the present there is no presumption that the State Legislature and the Electorate have investigated and found facts necessary to support the legislation and that if any state of facts, known or to be assumed, justifies the law, the court's power of inquiry ends.

In the *San Antonio* case the Supreme Court was called upon to rule upon the precise question whether these traditional rules are rendered inapplicable to situations like the present due to the existence of different aggregates of assessed valuation in different school districts or other units of government. The Supreme Court at pages 40-41 of 411 U.S. quoted from *Madden* v. *Kentucky,* 309 U.S. 83, 87-88 that:

> " 'The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized . . . [T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in

*e.g. *Califano* v. *Goldfarb,* 430 U.S. 199, 1977, *Craig* v. *Boren,* 429 U.S. 190, 1976, *Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 1975, *Frontiero* v. *Richardson,* 411 U.S. 677, 1973, *Reed* v. *Reed,* 404 U.S. 71, 1971, *Trimble* v. *Gordon,* ____ U.S. ____ , 52 L.Ed. 31, 1977, cited by appellants to the New York Court of Appeals Br. pp. 18-21, 35-37).

> formulating sound tax policies . . . It has been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes * * *.'"

It is important not to confuse the State and Federal questions in this matter. The argument which has been made on behalf of the City of Rochester and Frey in support of treating this situation as presenting some sort of suspect classification placing the burden on taxpayers who invoke the State constitutional tax limit to support its validity, which is, in other words, an assertion that this State constitutional provision is presumed to be *un*constitutional instead of as traditionally the other way around, appears to have its origin in such state court decisions as *Serrano* v. *Priest*, 5 Cal. 3d 584, 487 Pac. 2d 1241 (1971); 18 Cal. 3rd 728, 557 Pac. 2d 929 (1976); *Robinson* v. *Cahill*, 62 N.J. 473, 303 A.2d 273, 67 N.J. 333, 339 A2d 193, 202 (1975); *Horton* v. *Meskill*, 172 Conn. 592, 376 A.2d 359 (1977), and *Board of Education, Levittown Union Free School District, et al.* v. *Nyquist, et al.*, N.Y. Supreme Ct. Nassau County decided June 23, 1978. These decisions were all rendered under state constitutions and involved different questions.

Significantly in the case of *Board of Education, Levittown Union Free School District, et al.* v. *Nyquist, et al.*, decided at *nisi prius* in the New York Supreme Court, Nassau County, June 23, 1978, a copy of the decision in which has been furnished to this Court by counsel for the appellants, the trial judge disposed of the alleged Federal question as follows (p. 7):

> "By reason of the foregoing, it is alleged that the State's financing system violates the Federal Equal Protection Clause. The following statement in the Court's decision on the Defendants' motion for summary judgment rendered April 9, 1976 (at p. 2) is pertinent to this cause of action:
>
> > 'That portion of the original Plaintiffs' action which alleges violation of the Equal Protection Clause of the Federal Constitution is not being pressed in the light of the United States Supreme Court decision in *San Antonio School District* v. *Rodriguez*, 411 U.S. 1. That claim has not been abandoned but expressly reserved in the event the Supreme Court reconsiders its holding in the last cited case (Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, p. 8).'"



The fate of the *Levittown* case on appeal in the New York courts is by no means certain. Thus in *Alevy* v. *Downstate Medical Center*, 39 N.Y.2d 326 (1976) on which appellants rely (which involved reverse discrimination on account of race), the Court said at pages 332-333 of 39 N.Y.2d:

> "Significantly, however, the Supreme Court has held that education is not a fundamental interest (*San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1). Hence, if, as petitioner claims, strict scrutiny is to be invoked, it must be because this proceeding concerns a suspect racial classification, and not an education-related interest."

In *Matter of Levy*, 38 N.Y.2d 653, the same Court said at page 658:

> "Nor is the right to education such a 'fundamental constitutional right' as to be entitled to special constitutional protection (*San Antonio School Dist.* v. *Rodriguez*, 411 U.S. 1, 16). Accordingly, the appropriate standard is not the so-called strict scrutiny test *or anything approaching it*, but rather the traditional rational basis test. *Montgomery* v. *Daniels*, 38 N.Y.2d 41, 59. cf. *Matter of Jesmer* v. *Dundon*, 29 N.Y.2d 5, app. dsmd. 404 US 953.)" (Emphasis supplied).

Even if the *Levittown* decision were to be affirmed by the New York Court of Appeals, that would not change the posture of the instant appeals insofar as any Federal question is concerned. At page 78 of Justice L. Kingsley Smith's opinion in *Levittown*, furnished to the Court by counsel for appellants, it is stated:

> "In *Rodriguez* the Supreme Court refused to find that the Texas School Finance System violated the Federal Equal Protection Clause. Subsequent challenges to school finance systems insofar as they have been based on claims of unconstitutionality under the Federal Constitution similar to that of these plaintiffs have been rejected on the authority of the decision in *Rodriguez*. (*Robinson* v. *Cahill*, 303 A. 2d 273 [N.J. 1973], cert. den. 414 U.S. 976; *Serrano* v. *Priest*, 557 P.2d 929 [Cal. 1976]; *Horton* v. *Meskill*, 376 A.2d 359 [Conn. 1977]). *Accordingly, the claim of the original plaintiffs of unconstitutionality, to the extent that it has been made on federal grounds, is rejected.*" (Emphasis supplied).

Again at page 80 Justice Smith's opinion states:

> "For federal equal protection purposes education is not a fundamental right. (*San Antonio Independent School District* v. *Rodriguez*, *supra*). The question then is whether education has a different status for purposes of state equal protection analysis and review. Unlike the situation in *Rodriguez*, where the court found that education was nowhere mentioned in the Federal Constitution, the Education Article of New York's Constitution specifically guarantees a free education to all the state's children."

As has been pointed out above, in this case the Court of Appeals has ruled that the Education Article of New York's Constitution (Article XI, §1) does not overcome the invalidity under the New York State constitutional tax limits of chapters 349 (as amd by chapter 485) and 484 of the Laws of New York of 1976 which have been declared unconstitutional in their entirety. This decision by the State court of last resort is final



insofar as State law is concerned, and upholds the supremacy of the tax limits over other provisions of the State Constitution.

It is clear in any event that consistently with *San Antonio School District* v. *Rodriguez* the classifications of tax limits provided for by subdivision 10 of article VIII of the New York State Constitution cannot be held to be suspect under the Constitution of the United States. Upholding the New York State constitutional tax limits as has been done in this case by the New York Court of Appeals, does not necessarily require rejection by the New York Courts of the doctrine of *Serrano* v. *Priest* under State law. But rejection of the doctrine of *Serrano* v. *Priest* would require rejection of the attack on the New York State constitutional tax limits as in violation of the Fourteenth Amendment. Here the litigants have passed beyond all State questions, and the appellants are dependent entirely upon Federal constitutional law which has already been construed adversely to them by the Supreme Court in the *San Antonio* case.

It is not perceived how there can be any doubt about what was decided in *San Antonio School District* v. *Rodriguez*. It challenged the constitutionality, under the equal protection clause of the Fourteenth Amendment, of the State's statutory system for financing public education which authorizes ad valorem tax by each school district on property within the district to supplement educational funds received by each district from the State. That resulted in substantial inter-district disparities in per pupil expenditures which were attributable chiefly to differences in amounts received through local property taxation because of variations in the amount of taxable properties in each district. The three-judge district court had ruled that this Texas school financing system discriminated on the basis of wealth and was unconstitutional under the equal protection clause, ruling that (1) wealth was a suspect classification, and education was a fundamental interest, thus

requiring the state to show, under the strict judicial scrutiny test, a compelling state interest for its system, which the state had failed to do and (2) in any event that the state had failed to establish a reasonable basis for its system.

On appeal the United States Supreme Court reversed, and held that under the traditional equal protection test, the Texas financing system did not violate the equal protection clause.

The following quotations from the opinion in that case show how directly opposite it is to the position of the City of Rochester in this application. Thus the Supreme Court said at pages 47-48 of 411 U.S.:

> "In its reliance on state as well as local resources, the Texas system is comparable to the systems employed in virtually every other State."

Again at page 41 of 411 U.S.:

> "No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subject to criticism under the equal protection clause."

Again at page 44 of 411 U.S.:

> "The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for judicial scrutiny."

And yet again, pages 50-51 of 411 U.S.:

> "While it is no doubt true that reliance on local property taxation for school revenues provides less freedom of choice with respect to expenditures for some districts than for others, the existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system (*McGowan* v. *Maryland*, 366 U.S. 420, 425-6.)"



And finally on page 55 of 411 U.S.:

> "Moreover, if local taxation for local expenditures were an unconstitutional method of providing for education, then it might be an equally impermissible means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. * * * It has simply never been within the constitutional prerogative of this Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.
>
> "In sum, to the extent that the Texas system of school financing results in unequal expenditures between children who happen to reside in different districts, we cannot say that such disparities are the product of a system that is so irrational as to be invidiously discriminatory."

This statement is particularly important inasmuch as the Rochester position on these appeals is that local general property taxes violate the Fourteenth Amendment when levied for general city purposes and not merely when levied only for education (Jurisdictional Statement, p. 17).

In the recent case of *Massachusetts Board of Retirement* v. *Murgie*, 427 U.S. 307 (1976) the Supreme Court cited with approval *San Antonio School District* v. *Rodriguez*, and said at page 314:

> "We turn then to examine this state classification under the rational basis standard. This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary" citing *Dandridge* v. *Williams*, 397 U.S. 471 at page 485.

If there is no invidious discrimination in taxation for educational purposes arising from inequality in burdens and advantages of this nature, *a fortiori* there cannot be any basis for a ruling that there cannot be discrepancies in tax limits for other municipal purposes.

Equality is far from being achieved by appellants' position inasmuch as they want no limit to the amounts that can be raised in the areas that have smaller assessed valuations with the result that their tax rates could be many times those of areas with larger assessed valuations. One of the purposes of State constitutional tax limitations is to prevent the major burden being cast upon real property in areas of low assessed valuation instead of the discrepancy being reduced by State aid.

Moreover, the City of Rochester and Frey are urging that the equal protection of the laws forbids general property ad valorem taxation not only for education but for every other city purpose. It is settled that such inequalities do not invalidate State constitutional or legislative tax limits under the Fourteenth Amendment.

**Cases Cited for Appellants Are Neither Relevant Nor Controlling.**

Although tax limits as such were not formally involved in the *San Antonio School District* v. *Rodriguez* case, the rationale of the Supreme Court militates against the position of these Rochester parties and overrules whatever aid or comfort they claim to derive from *Hargrave* v. *Kirk*, 313 Fed. Supp. 944, reversed and vacated *sub nom Askew* v. *Hargrave*, 401 U.S. 476, or *Levy* v. *Parker*, 346 Fed. Supp. 897, affd. 411 U.S. 978.

Appellants virtually acknowledge that their contention is overruled by the rationale of the *San Antonio* case by arguing that the claimed unconstitutionality of the New York State constitutional tax limits arises from a discrepancy in the



amount of money available per pupil in schools in different districts. This is shown at page 12 of the Jurisdictional Statement by the assertion:

> "Any tax limit is also necessarily a spending limit; they are two faces of the same coin. If a municipality or school district is limited in the amount of tax revenue it can collect, it is also necessarily limited in the amount of money it has to spend."

That is exactly what was before the Supreme Court of the United States in the *San Antonio* case, where it was vigorously argued by the dissenting justices that local ad valorem real property taxes for school purposes are invalid for that reason.

It can make no difference under the equal protection clause of the Fourteenth Amendment whether disparities in revenue derived from ad valorem taxation arise from unequal tax limits or inequality in the quantum of assessed valuation to which the tax rates are applied.

If the degree of uniformity were to be required for which counsel contends, the formulation of any tax limits or debt limits would be a practical impossibility. Even if there were a single uniform percentage tax limit for every type of governmental unit in the State, there would be complaints that the taxable real property varied in value in different tax units or that there was maldistribution of the proceeds of the taxes.

If there were a triable issue wherever some alleged inequality or inequity existed in tax law, or in appropriations for education, the courts would lack time to attend to any other business.

**Appellants' Position Is Dependent upon an Untenable Concept that the Burden is Cast upon any Taxpayer Relying on a State Constitutional Tax Limit to Justify Its Existence under the Federal Constitution.**

The brief for the City of Rochester and intervenor Frey virtually acknowledged that they cannot prevail upon this point under the traditional rule that constitutionality is to be presumed if classification is based on any rational assumption, or unless this Court were to hold, in effect, as stated in the opinion of the Appellate Division, that "the burden is cast upon the party relying on the [tax limitation] provision to justify its constitutionality." (61 App. Div. 2d 164).

In the sex distinction case of *Reed* v. *Reed*, 404 U.S. 71 (1971), the Supreme Court was careful to limit the "suspect type" of case so as to exclude situations like the present. In the *Frontiero* case the Supreme Court quoted from *Reed*, at pages 682-683 of 411 U.S. as follows:

> "The Court noted that the Idaho statute 'provides that different treatment be accorded to the applicants on the basis of their sex; it thus established a classification subject to scrutiny under the Equal Protection Clause.' 404 U.S. at p. 75. *Under traditional 'equal protection analysis, a legislative classification must be sustained unless it is 'patently arbitrary' and bears no rational relationship to a legitimate* governmental interest. See *Jefferson* v. *Hackney*, 406 U.S. 535, 546 (1972); *Richardson* v. *Belcher*, 404 U.S. 78, 81 (1971); *Flemming* v. *Nester*, 363 U.S. 603, 611 (1960); *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970)." (Emphasis supplied).

The New York State constitutional tax limits come under the latter principle.



**Appellants have not Shown any Basis or Triable Issue on which to Overcome the Presumption that the New York State Legislature and Electorate Investigated and Found Facts Necessary to Support these New York State Constitutional Tax Limitations, or that no Rational State of Facts that Could Be Assumed Justifies these Limitations.**

These appellants argue that there is no conceivable rational basis for omitting tax limits on towns, common school districts, union free school districts or central high school districts. There are a number of reasons which could have actuated the Legislature in making these exceptions. As was pointed out by Special Term herein (90 Misc. 2d 474) the budgets of the school districts not subject to tax limits "are all voted on, not by the respective school boards, but by the voters of the common, union free, or central school districts". Upon the other hand although a public hearing is held on the tentative budget prepared by the trustees of city school districts (§2517 Education Law) the budget is revised and adopted by vote of the school board (§§2518, 2519) without being submitted to the voters. Town governments are well known for being close to the people. It may well be that the Constitution considered that these provisions enabled the voters to hold educational expenditures in check by means which were not available in city school districts or other municipalities.

If the Corporation Counsel is correct in indicating that in order to be valid taxes imposed by different units of government must be uniform, there would not be justification for the City of New York, for instance, or any other municipality to impose an income tax that is not levied elsewhere in the State. The New York State constitutional tax limits would have been invalid from their inception, when in 1884 the Constitution imposed a tax limit only upon cities and counties containing cities of more than 100,000 population. That provision, in force until the Constitutional Convention of 1938, did violence to these appellants' contention that larger centers of population need

higher rates than smaller ones, or indicated that the smaller communities would be more likely to exercise control through the ballot box.

The appellants complain that the City of Rochester, for example, is limited to 2% for all city purposes including education, whereas the City of Geneva, which also has a 2% limit, has the financial burden of education taken off from its hands by the Geneva City School District which has a tax limit of 1½% of its own.

That reasoning does not take account of the circumstance, however, that with the exception of education, public works, police and fire protection and some other activities, the City of Rochester has transferred the burdens of welfare, airport, its larger parks, weights and measures and many other responsibilities to the County of Monroe which has a separate 1½% constitutional tax limit. It is thus by dubious reasoning that it is argued that §10 of Article VIII of the State Constitution denies equal protection in that it imposes a 2% limit on the taxes levied in Rochester and other large cities, but allows tax levies of up to 3¼% or 4% in small cities. The argument based on the huge burden of larger city welfare does not hold weight in view of the transfer of this entire expenditure by Rochester and other cities to the counties in which they are situated. Nor does it justify the imposition by Rochester of the greatest real property tax burden of any city in the State of New York (p. 77 of N.Y. State Senate Standing Committee on Cities and the City of N.Y., Legislative Document 1978 N.Y.S.L.D. — S0031600).

Argument is made that the effect of the tax limit classifications contained in Article VIII, §10 of the State Constitution is to subject cities having populations of 125,000 or more to lower tax limitations than smaller cities and other municipalities. This is not invariably the effect of this provision in the State Constitution but, more importantly, if it were true, it raises a question of public policy which was settled by the



people of the State in their adoption of the State Constitution. It is debatable that the greater concentration of persons in large cities requires greater expenditure per capita than is true in smaller municipalities, and even if it did the constitutional limitations on the general property tax on real property may well have been animated by other factors, such as that the larger cities can more readily resort to other sources of revenue including a greater variety of excise taxes, sales taxes, state aid or even local income taxes. It is fallacious to argue, for instance, as the Corporation Counsel has done, that as a larger city Rochester is burdened with greater needs for public assistance when the burden of welfare has been transferred to Monroe County which has a separate 1½% per cent tax limit. It was the function of the Legislature and the people in adopting the State Constitution to take account of all these matters as they saw fit. There is a presumption that they investigated and found facts necessary to support these tax limits, and the existence of situations indicating their desirability. Thus if any state of facts known or to be assumed justifies these state constitutional tax limits, the Courts' power of inquiry ends. (*Matter of Spielvogel* v. *Ford*, 1 N.Y. 2d 558, 562, app. dism. 352 U.S. 952).

Measured by this test, the data set forth in behalf of appellants fails to support the conclusion that there is no rational basis for small cities and other municipalities to have greater taxing power than the large cities of the state. In adopting the constitutional limits, the people may have thought that the danger of extravagance was greater in larger cities. It is even conceivable that the electorate may have foreseen the flight from the cities as a result of excessive municipal taxation.

**If Appellants' Position were to be Sustained, it would be Impossible to Draft or Enact Tax Limitations.**

If the Corporation Counsel were correct in his conclusions on this subject, it would be impossible to draft valid tax limitations which would be workable. This was pointed out by the Committee on Problems Relating to Taxation and Finance in its report to the delegates to the 1938 New York State Constitutional Convention, in discussing proposals to extend the constitutional tax limit to all local units (236, 238; 255-266). In discussing arguments that might be advanced against unifying the 2% tax limit in all taxing units and municipalities in general, the committee said (237):

> "To impose, by constitutional mandate, a fixed limit on all municipalities, irrespective of size, special needs, wealth, or local desires is to regulate by mechanical rule and to ignore the varying problems of different localities. The finances of localities should be adjusted to local conditions."

Obviously there has to be some overlapping of tax limitations unless a single "overall" tax limit is to be attached to the largest unit of government, allocations of the proceeds of whose taxes would have to be made to some extent in some manner to other units. An illustration of the problems involved in this was presented in the case of *Oklahoma Pipeline Co.* v. *Excise Board of Carter County*, 171 Okla. 203, 42 P. 2d 499, where under an overall tax procedure the units of government competed for the major distributions.

Even if there were a statewide general real property tax (differing from state to state), the same objections that appellants seek to raise would require impossible uniformity in the distribution of the proceeds to local governments. This was exactly what the delegates to the 1938 New York Constitutional Convention sought to avert by not having a fixed limit on all municipalities and by avoiding the alternative of an overall rate to be divided between the units of government where they overlap (see Committee Report, *supra*, p. 259 seq.)



**Tax Limitations Such as are Involved have been Adopted and Sustained in Many Jurisdictions throughout the United States.**

The extent to which various states have resorted to tax and debt limitations over a long period of time is expressed in McQuillin on Municipal Corporations (1973 ed.) at §44.26 as follows:

> "A common express restriction upon the municipal power to tax is one limiting the amount of the rate that may be imposed in any one year. The validity of such a provision generally is sustained. The limitation may be and is frequently contained in the constitution of the state, thus expressing the will of its people. Such a provision may be self-enforcing, and may abrogate statutory provisions on the subject. However, if the constitution does not fix tax limits, the legislature may do so, and the limitations so prescribed are found in statutory enactments, or are contained in charter provisions. So provisions limiting the amount or the rate of certain special taxes are often found in state constitutions, and other laws; and where the levy of taxes for a particular purpose is limited to a certain per cent, the courts cannot ordinarily compel a larger levy even to fulfill a contract."

The statements in this paragraph are supported by citations of decisions in more than thirty states as well as in the federal courts. Nor do those decisions comprise all of the instances where constitutional and statutory tax limitations have been enforced in the case of municipalities and school districts (cf. 79 C.J.S. Title: Schools and School Districts §§380-381; AmJr.Title: State and Local Taxation §§141-142, 64 C.J.S. Title: Municipal Corporations §1989d).

In an often quoted opinion in *Bell's Gap Railroad* v. *Pennsylvania*, 134 U.S. 232, the opinion thus expressed the range of the power of taxation:

> "It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislatures, or the people of the State framing their constitution."

We have been able to discover no decision holding the other way, but there are a number of cases on this point in which this point was raised and overruled.

The Nassau County New York Supreme Court had occasion to consider it and decide it adversely to appellants in *Chisena* v. *Central High School Dist. No. 2 of the Towns of Hempstead and North Hempstead,* 136 N.Y.S. 2d 598 (not officially reported).

Cases are cited from numerous other jurisdictions in §41.13n2 McQuillin upholding the validity of overlapping debt limits of municipalities which are clearly in point. The following language taken from *Wilson* v. *Board of Trustees,* 133 Ill. 443, 27 N.E. 203, which is quoted in *Board of Highway Com'rs.* v. *City of Bloomington,* 253 Ill. 164, 97 N.E. is particularly articulate:

> "The validity of the act was challenged, on the ground that to authorize the organization of such districts with power to become indebted to the constitutional limit, and embracing other municipalities which also had a like power of contracting indebtedness, would, in effect, destroy the constitutional limitation as to municipal indebtedness. The validity of the act was sustained, and this court held that the constitutional limitation upon the extent of corporate indebtedness applies to each municipal corporation singly, and that, where one municipal corporation embraces in part the same territory as others, each may contract corporate indebtedness up to the constitutional limitation, without reference to the indebtedness of any other corporation embraced wholly or in part within its territory."



And the Illinois court also said:

> "The principle of uniformity is not violated by levying taxes by two overlapping municipalities on the same property, even though it be for a similar purpose" citing *Baird* v. *People,* 83 Ill. 387.

In *People* v. *Schweitzer,* 369 Ill. 355, 16 N.E. 2d 897, the Supreme Court of Illinois upheld a tax limit against charges of lack of uniformity which applied only to the city of Chicago.

If, as the Corporation Counsel of the City of Rochester argues, it were to be held that wherever there is some inequality or lack of symmetry in the tax structure, a question of fact is presented concerning the equal protection of the laws, the courts would be swamped with litigation. It was stated in *Magoun* v. *Illinois Trust & Savings Bank, supra,* (170 U.S. at p. 293): "With these for illustration it may be safely said that the rule prescribed no rigid equality and permits to the discretion and wisdom of the State, a wide latitude as far as interference by this court is concerned," and as said by the Supreme Court of Oregon in *Garbade* v. *City of Portland* (214 P. 2d 1000): "Under the equal protection clauses of the state and federal constitutions the state is not confined 'to a formula of rigid uniformity in framing measures of taxation. It may tax some kinds of property at one rate, and others at another, and exempt others altogether', and it 'may lay an excise on the operations of a particular kind of business, and exempt some other kinds of business closely akin thereto.' *Steward Machine Co.* v. *Davis, supra,* 301 U.S., at pages 583, 584 and the cases therein cited. The above enunciated rules are applicable to municipalities."

If the equal protection clauses were applied as precisely as the defendant City of Rochester contends, many taxes imposed by city, state and nation would be invalidated. One wonders how the federal tax reform act of 1976 would fare under such an analysis.

**Constitutional Tax Limitations are an Especially Relevant Means of Control in States where, as here, they have been Studiously Evaded and where the Taxes and Educational Expenditures are the Highest in the Nation.**

These pleas for an ever increasing scope of real property taxation come from the highest taxed state in the country which has the highest level of educational expenditures in the nation, and from a city which has the greatest real property tax burden of any city in the State of New York (p. 77 of N.Y. State Senate Standing Committee on Cities and the City of N.Y., New York Legislative Document 1978 N.Y.S.L.D. — S0031600).

No question of fact is here presented. That argument is simply a device to enable the City perpetually to exceed its constitutional tax limit. If a question of fact of this nature were held to exist, it would result in the practical elimination of all tax and debt limitations, which could not exist under the system of uniformity insisted upon by these applicants if the burden of demonstrating constitutionality of the State Constitution were cast upon the taxpayer.

The basic unconstitutionality under the New York State Constitution of by-passing the State constitutional tax limit by evasive legislation of this character was decided by the New York Court of Appeals in *Hurd* v. *City of Buffalo*, 34 N.Y. 2d 628, on March 27, 1974. Since then the State Legislature has passed more than half a dozen statutes, culminating in the ones held invalid in this action, that are popularly known as "gimmicks" designed to circumvent these constitutional tax limits. These attempts have been decisively nullified by the State courts in this case. Under color of these statutes, however, and commencing with the one which was held unconstitutional in *Hurd* v. *City of Buffalo*, the City of Rochester has annually exceeded its lawful constitutional tax limit, as shown by its own annual reports to the State Comptroller pursuant to the State Finance Law (Record on Appeal to N.Y. Court of Appeals pp. 169-173, 186) by the following amounts.



| | | |
|---|---|---|
| 1970-1971 | — | $ 5,000,000 |
| 1971-1972 | — | $14,000,000 |
| 1972-1973 | — | $16,000,000 |
| 1973-1974 | — | $18,000,000 |
| 1974-1975 | — | $24,000,000 |
| 1975-1976 | — | $26,000,000 |
| 1976-1977 | — | $29,000,000 |
| Total | | $132,000,000 |

Instead of confronting the central problem of municipal finance, the cities of Rochester and Buffalo, with the aid of this type of unconstitutional legislation, have temporized with this issue instead of facing the problems of municipal finance which it reflects.

In the Lackawanna and Geneva School District cases, contemporaneously decided in the New York Court of Appeals and Appellate Division, the school boards did not raise this alleged federal question and have declined to identify themselves with it.

**This Motion should be Granted and these Appeals Dismissed under Rule 16(b) of the Rules of the Supreme Court upon the Ground that no Substantial Federal Constitutional Question is Presented, with Costs and Disbursements to Appellee.**

VAN VOORHIS & VAN VOORHIS
*Attorneys for Plaintiff-Appellee*
Office & P.O. Address
One Graves Street
Rochester, New York 14614
Telephone: (716) 232-4221

John Van Voorhis
*Of Counsel*

# APPENDIX

# APPENDIX A

## Order of State Court of Appeals

State of New York,
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of September A.D. 1978

Present, HON. CHARLES D. BREITEL, Chief Judge, presiding.

---

Mo. No. 776

Jeannette C. Waldert,

*Respondent-Appellant,*

*vs.*

City of Rochester,

*Appellant-Respondent,*

and Thomas R. Frey,

*Intervenor-Appellant-Respondent,*

Hon. Louis J. Lefkowitz,
Attorney General of the State
of New York,

*Intervenor.*

---

A motion for reargument in the above cause having heretofore been made upon the part of the appellant-respondent and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with twenty dollars costs and necessary reproduction disbursements.

/s/ JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

## APPENDIX B

### Appellate Division Opinion
### 61 App. Div. 2d 147

BETHLEHEM STEEL CORPORATION, Respondent, v BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF LACKAWANNA et al., Appellants; LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York, Intervenor.

JEAN W. JONES et al., Respondents, v CITY SCHOOL DISTRICT OF THE CITY OF GENEVA, Appellant; LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York, Intervenor.

JEANNETTE C. WALDERT, Respondent, v CITY OF ROCHESTER, Appellant; THOMAS R. FREY, Intervenor-Appellant; LOUIS J. LEFKOWITZ, as Attorney-General of the State of New York, Intervenor.

Fourth Department, January 20, 1978

### SUMMARY

APPEALS, in the first above-entitled action, from a judgment of the Supreme Court at Special Term (FREDERICK M. MARSHALL, J.), entered August 22, 1977 in Erie County, which (1) declared unconstitutional chapters 349 and 484 of the Laws of 1976, (2) determined that certain appropriations for pension and health insurance expenses were illegal and (3) directed respondents to adopt and publish a revised final budget to eliminate said amounts from the computation of the constitutional tax limitation.

APPEAL, in the second above-entitled action, from a judgment of the Supreme Court at Special Term (MARSHALL E. LIVINGSTON, J.), entered July 11, 1977 in Ontario County, which (1) declared chapter 349 of the Laws of 1976 unconstitutional and (2) awarded to plaintiffs the excess taxes paid by them upon the 1976-1977 tax levies imposed upon their real properties in excess of the constitutional tax limitation.



APPEALS, in the third above-entitled action, from a judgment of the Supreme Court at Special Term (MARSHALL E. LIVINGSTON, J.), entered June 30, 1977 in Monroe County, which (1) declared chapter 349 of the Laws of 1976 unconstitutional and (2) awarded to plaintiff the excess real property taxes paid upon the 1976-1977 tax levy.

As part of its efforts to avoid the impact of the Court of Appeals decision in *Hurd v City of Buffalo* (34 NY2d 628, affg 41 AD2d 402), which declared paragraph 42-a of subdivision a of section 11.00 of the Local Finance Law to be unconstitutional insofar as it excluded the City of Buffalo's future annual requirement for pension and retirement liabilities from the tax limit provided in sections 10 and 11 of article VIII of the New York Constitution, the Legislature, in attempting to alleviate the continuing financial problems of the Cities of Buffalo and Rochester and of certain school districts, enacted the Emergency City and School District Relief Act (Emergency Relief Act) (L 1976, ch 349, § 2) and its companion statute, the State Real Property Tax Act (L 1976, ch 349, § 3), the latter to become effective only if the Emergency Relief Act was held unconstitutional by the Court of Appeals. These statutes were designed to empower the municipalities and school districts to raise revenue through real property taxes free of the applicable constitutional tax limitations and, along with chapter 484 of the Laws of 1976 (State Aid for School Districts Act), exempt certain pension, Social Security and health insurance contributions from school district tax limits and alternatively provide for a State real property tax for those purposes. In the first above-entitled action, Special Term held chapter 349 as well as chapter 484 of the Laws of 1976 unconstitutional under *Hurd v City of Buffalo*, determined that certain appropriations for pension and health insurance expenses were illegal and directed respondents to adopt and publish a revised final budget to eliminate said amounts from the computation of the constitutional tax

limitation. In the second and third above-entitled actions, in which taxpayers sought to recover alleged illegal overpayments from their taxing districts, Special Term declared chapter 349 of the Laws of 1976 to be unconstitutional and granted summary judgment for the amounts of the overpayments.

On appeal, the Appellate Division modified. In an opinion by Justice HANCOCK, JR., it was held that chapters 349 and 484 of the Laws of 1976 are unconstitutional and that the amounts appropriated for pension and health insurance expenses were improperly excluded from the tax limit. However, the court modified the judgments in the second and third above-entitled actions to delete the provisions directing repayments and also modified the judgment in the first above-entitled action to delete the provision directing the board of education to revise its final budget to exclude the appropriations for certain pension, Social Security and health insurance expenses.

*Bethlehem Steel Corp. v Board of Educ.*, 91 Misc 2d 258, modified.

*Waldert v City of Rochester*, 90 Misc 2d 472, modified.

*Jones v City School Dist. of City of Geneva*, 90 misc 2d 472, modified.

## HEADNOTES

**Taxation — Constitutional Limitation on Real Property Taxes**

1. The Emergency City and School District Relief Act (L 1976, ch 349, § 2), which establishes a period of probable usefulness of three years for the costs of retirement and Social Security for the cities of Buffalo and Rochester and certain school districts, when read in conjunction with subdivision (b) of section 11 of article VIII of the New York Constitution, permits these municipalities and school districts to exclude the amounts appropriated for



retirement and Social Security costs from the computation of the total amount of revenue that may be raised by the real property tax levy under the limitations established by section 10 of article VIII of the New York Constitution.

**Taxation — Constitutional Limitation on Real Property Taxes**

2. The State Real Property Tax Act (L 1976, ch 349, § 3), a companion stand-by statute to the Emergency City and School District Relief Act (L 1976, ch 349, § 2), in the event the latter is declared unconstitutional, allows the governing body of the cities of Buffalo and Rochester and certain school districts to request the State Comptroller to make State aid payments to the municipality in an amount not to exceed a maximum amount set forth for each municipality in the statute, which maximum amounts are equivalent to the amounts which the municipalities would have been able to exclude from the tax limitation under the Emergency City and School District Relief Act.

**Taxation — Constitutional Limitation on Real Property Taxes**

3. The temporary nature of the Emergency City and School District Relief Act (L 1976, ch 349, § 2), as opposed to the ongoing grant of authority for the exclusion of retirement and pension contributions from the constitutional tax limit contained in paragraph 42-a of subdivision a of section 11.00 of the Local Finance Law, declared unconstitutional in *Hurd v City of Buffalo* (41 AD2d 402, affd 34 NY2d 628), makes it no less a measure to evade section 10 of article VIII of the New York Constitution, limiting taxes on real property, which is "palpably in violation of the plan and purpose" of the "unified and interdependent plan to control the taxing and debt-contracting power of the subdivisions of the State" condemned by the court in *Hurd*.

**Taxation — Constitutional Limitation on Real Property Taxes**

4. Although the Emergency City and School District Relief Act (L 1976, ch 349, § 2) limits the amount of appropriations for pension and Social Security benefits that may be excluded from the tax limit in the second, third and fourth fiscal years to the amount excluded in the first year, while paragraph 42-a of subdivision a of section 11.00 of the Local Finance Law, declared unconstitutional in *Hurd v City of Buffalo*, 41 AD2d 402, affd 34 NY2d 628), excluded all of the amounts for pensions and Social Security, there is no greater reason for finding a rational basis in the legislative determination that pension and Social Security benefits have a period of probable usefulness of three years in the Emergency City and School District Relief Act than in paragraph 42-a of subdivision a of section 11.00 of the Finance Law.

**Taxation — Constitutional Limitation on Real Property Taxes**

5. The Emergency City and School District Relief Act (L 1976, ch 349, § 2) does not provide a temporary emergency solution to the fiscal and social problems of the cities and school districts so as to warrant suspension of constitutional limitations under the State police power.

**Taxation — Constitutional Limitation on Real Property Taxes**

6. In view of the fact that the Emergency City and School District Relief Act (L 1976, ch 349, § 2) is a device to evade the plan to control the taxing and debt-contracting power of the subdivisions of the State, contrary to *Hurd v City of Buffalo* (41 AD2d 402, affd 34 NY2d 628), its companion stand-by statute, the State Real Property Tax Act (L 1976, ch 349, § 3), which has



as its purpose the exact similar goal of financing the operations of certain cities and school districts and providing a temporary emergency solution to the problem currently being encountered by the cities and school districts in order to avoid fiscal and social chaos, is equally unconstitutional.

**Taxation — Constitutional Limitation on Real Property Taxes**

7. That the State Real Property Tax Act (L 1976, ch 349, § 3) is labeled a State Tax and that the tax is to be collected by the State and remitted to the cities and school districts through the device of State aid, does not make it a State tax, thus exempting it from the limitations imposed by section 10 of article VIII of the New York State Constitution, since it has the same purpose and effect as the Emergency City and School District Relief Act (L 1976, ch 349, § 2), concededly a measure designed to permit local taxes.

**Taxation — Constitutional Limitation on Real Property Taxes**

8. Because of its lack of uniformity of application, the State Real Property Tax Act (L 1976, ch 349, § 3) could not be considered to be a State tax without being in violation of the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution and sections 6 and 11 of article I of the New York Constitution.

**Parties — Standing**

9. The fact that the State Real Property Tax Act (L 1976, ch 349, § 3) is a companion stand-by statute to the Emergency City and School District Relief Act (L 1976, ch 349, § 2) and the cities and school districts will be permitted to take steps to implement it and have taxes levied under it only if and when the

Court of Appeals declares the latter act to be unconstitutional, does not make the challenge to the Real Property Tax Act's constitutionality prospective, thus presenting no justiciable controversy.

**Declaratory Judgments — Advisory Judgment**

10. The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory; where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct.

**Taxation — Constitutional Limitation on Real Property Taxes**

11. Chapter 484 of the Laws of 1976 (State Aid for School Districts Act), which assigns to the cost of current health and dental insurance coverage a period of probable usefulness of three years, resulting in the exclusion of those amounts from the tax limitations prescribed in section 10 of article VIII of the New York Constitution, is unconstitutional.

**Taxation — Constitutional Limitation on Real Property Taxes**

12. The 2% tax limit for "city purposes" imposed by subdivision (b) of section 10 of article VIII of the New York Constitution should not be construed as excluding sums appropriated for educational purposes.



**Constitutional Law — Limitation of Real Property Taxes**

13. The tax limitations of section 10 of article VIII of the New York Constitution are not based on unlawful and suspect classifications so as to render the provision unconstitutional under the equal protection and due process clauses of the Fourteenth Amendment of the United States Constitution.

**Taxation — Repayment of Illegal Tax**

14. Although the legislation relied upon in attempting to exclude appropriations for pension and Social Security expenses from school district tax limits (L 1976, ch 349) was unconstitutional in violation of section 10 of article VIII of the New York Constitution, to mandate repayments of those portions of real property taxes illegally collected under the 1976-1977 tax levies in reliance on the statute, which was not then under challenge, would place an impossible burden on the municipalities, which relied on the taxing authority granted in the statute in preparing their budgets.

**TOTAL CLIENT-SERVICE LIBRARY® REFERENCES***

58 NY JUR, Taxation §§ 19-21
CLS, New York Constitution Art 8 §§ 10, 11; CLS, Local Finance Law § 11.00; CLS, Unconsolidated Laws Chs 59-B, 268-A
72 AM JUR 2d, State and Local Taxation §§ 122 et seq.

*By the Publisher's Editorial Staff.

---

**APPEARANCES OF COUNSEL**

*Peter A. Vinolus (John J. Olszewski* of counsel), for Board of Eduction of City School District of Lackawanna and others, appellants.

*David K. Floyd* for Bethlehem Steel Corporation, respondent.

*Louis J. Lefkowitz, Attorney-General (Jean Coon* and *Ruth Kessler Toch* of counsel), for intervenor.

*Albert E. Bond* for City School District of the City of Geneva, appellant.

*Van Voorhis & Van Voorhis (John Van Voorhis* of counsel), for Jean W. Jones and others, respondents.

*Harry Treinin* for City School District of City of Corning, *amicus curiae.*

*Louis N. Kash, Corporation Counsel,* for City of Rochester, appellant.

*Lamb, Webster, Walz, Donovan & Sullivan (Louis N. Kash* and *Herman J. Walz* of counsel), for intervenor-appellant.

*Leslie G. Foschio Corporation Counsel (Stanley Moskal* of counsel), for City of Buffalo, *amicus curiae.*

**OPINION OF THE COURT**

HANCOCK. JR., J.

The central question on these appeals is the constitutional validity in the light of *Hurd v City of Buffalo* (34 NY2d 628, affg 41 AD2d 402 on opn of MOULE, J.) of the latest effort[1] by the Legislature (L 1976, ch 349, amd by L 1976, ch 485)[2] to alleviate

[1]Since the *Hurd* decision in March 27, 1974, the Legislature has enacted chapters 496 and 497 of the Laws of 1974 (providing a period of probable usefulness for pensions and Social Security costs on a temporary emergency basis, limited to the fiscal year 1974-1975) and chapters 322 to 325 of the Laws of 1975 (extending through the fiscal year 1975-1976 the effect of chapters 496 and 497 of the Laws of 1974).

[2]The State Real Property Tax Act (L 1976, ch 349 § 3) was amended by chapter 485 of the Laws of 1976 with respect to matters not here in question. Henceforth, reference to the amendment (L 1976, ch 485) will be omitted.



the continuing financial problems of the Cities of Buffalo and Rochester and of certain school districts. In the *Hurd* decision, the Court of Appeals invalidated a legislative attempt to solve Buffalo's budgetary crisis through the device of adding paragraph 42-a to subdivision a of section 11.00 of the Local Finance Law to assign a period of probable usefulness of three years to amounts paid for pension and Social Security benefits (L 1969, ch 1105). The intended effect of paragraph 42-a (§ 11.00, subd a) was the exclusion of the taxes to defray the cost of pension and Social Security benefits from the constitutional provision pertaining to the City of Buffalo limiting the amount of taxes to be raised from real estate to 2% of the five-year average full value (NY Const, art VIII, § 10, subd [b]; § 11, subd [b]). In holding paragraph 42-a (§ 11.00, subd a) unconstitutional, the court found that the statute was a measure to evade and "palpably in violation" of the "unified and interdependent [constitutional] plan to control the taxing and debt-contracting power of the subdivisions of the State" established by the New York Constitution (art VIII, § 10, subd [b]; § 11, subd [b]). *(Hurd v City of Buffalo,* 34 NY2d 628, 629, *supra.)*

The legislation in question here (L 1976, ch 349) — like paragraph 42-a of subdivision a of section 11.00 of the Local Finance Law — is designed to empower the municipalities and school districts to raise revenue through real property taxes free of the applicable constitutional tax limitations. This enactment, containing two separate statutes known as the Emergency City and School District Relief act (hereinafter cited as Emergency Relief Act) (L 1976, ch 349, § 2) and the State Real Property Tax Act (L 1976, ch 349, § 3), was concededly prompted by the refusal of the voters in November, 1975 to approve an amendment to article VIII (§ 11, subd [b]) of the Constitution of New York which would have modified or repealed the tax limitation and freed the municipalities from their financial predicament (see Legislative Findings, L 1976, ch 349, § 1). Further, from the

Legislative Findings (L 1976, ch 349 § 1) it is evident that the legislation is designed to accomplish its purpose of skirting the constitutional limits in section 10 of article VIII in a way that will conform to the *Hurd* decision.[3]

[1] The Emergency Relief Act (L 1976, ch 349, § 2) establishes a period of probable usefulness of three years for the costs of retirement and Social Security for the Cities of Buffalo and Rochester and for any school district which is coterminous with, or partly within or wholly within, a city having less than 125,000 inhabitants according to the latest Federal census. Read in conjunction with subdivision (b) of section 11 of article VIII of the New York Constitution, this act permits the Cities of Buffalo and Rochester and some school districts to exclude the amounts appropriated for retirement and Social Security costs in the computation of the total amount of revenue that may be raised by the real property tax levy under the limitations established by the New York State Constitution (art VIII, § 10).

[2] The State Real Property Tax Act (L 1976, ch 349, § 3) is to become effective in the event that the Emergency Relief Act is declared unconstitutional by the Court of Appeals. It applies to cities having a population of 125,000 or more inhabitants but less than 1,000,000 and to any school district which is coterminous with, or wholly or partly contained within, a city having a population of less than 125,000 inhabitants. The governing body of any such city or school district may request the State Comptroller to make State aid payments to the municipality in

[3]For example, section 1 of the Legislative Findings (L 1976, ch 349) states in part, "It is the purpose of section two of this act to afford such cities and school districts temporary relief * * * while preventing any increase of non-conformity with the determination in the case of *Hurd v City of Buffalo*". (See n 7, *infra*.)



an amount not to exceed a maximum amount set forth for each municipality in the statute (State Real Property Tax Act, § 4; L 1976, ch 349, § 3). These maximum amounts are equivalent to the amounts which the municipalities would have been able to exclude from the tax limitation under the Emergency Relief Act (e.g., Rochester — $32,000,000; Buffalo — $39,000,000). The State is empowered to levy a State real estate tax on the recipient municipality in the same total amount as the State aid granted, to be collected by the municipality in the same manner and at the same time as city and school district real property taxes. The act, if it becomes effective, will expire on June 30, 1980.

In the two above-entitled declaratory judgment actions (Waldert v City of Rochester, and Jones v City School Dist. of City of Geneva), in which taxpayers have sought to recover alleged illegal overpayment from their taxing districts, Special Term has declared chapter 349 of the Laws of 1976 to be unconstitutional and has granted summary judgment for the amounts of the overpayments.

In Bethlehem Steel Corp. v Board of Educ., an article 78 proceeding brought by petitioner as a taxpayer against the City School District of Lackawanna, Special Term has also held chapter 349 of the Laws of 1976 unconstitutional. In addition, the court invalidated chapter 484 of the Laws of 1976[4] pursuant to which the costs of health and dental insurance were excluded

[4]State Aid for School Districts Act (L 1976, ch 484) amends, by extending to 1979 the expiration date of, chapter 587 of the Laws of 1973, which, *inter alia*, assigns a period of probable usefulness to the employer's share of the cost of current health and dental insurance coverage, resulting in the exclusion of those amounts from computation of the tax limits for operating purposes set forth in section 10 of article VIII of the New York State Constitution. This act applies to any school district which is coterminous with, or partly within or wholly within, a city having less than 125,000 inhabitants.

from the tax limit.[5] Special Term determined the appropriations for pension expense in the amount of $1,712,000 and health insurance in the amount of $343,000 to be illegal and directed respondents to adopt and publish a revised final budget to eliminate said amounts from the computation of the constitutional tax limitation. Further, Special Term enjoined respondents from mailing any tax statement to the taxpayers until the budget had been so revised. Respondents appealed, and, relying on the automatic stay provisions in CPLR 5519 (subd [a], par 1), proceeded to mail out tax statements based on the original budget. These mailings were again temporarily enjoined by an order to show cause, but the automatic stay is now in effect by order of this court. On the argument it was agreed that the balance of the statements had been mailed.

For the reasons hereinafter stated, we affirm the judgments in Waldert v City of Rochester, and Jones v City School District insofar as they declare chapter 349 of the Laws of 1976 unconstitutional, but modify the judgments to delete the provision directing repayments. The judgment in Bethleham Steel Corp. v Board of Educ. is affirmed insofar as it declares chapters 349 and 484 to be unconstitutional and determines that the amounts appropriated for pension expense and health insurance were improperly excluded from the tax limit. The relief granted to petitioner is modified as hereinafter set forth.

In addition to contending that the operative statutes (L 1976, chs 349, 484) are constitutional, in which the Attorney-General

[5]Petitioner Bethlehem Steel Corp. also questioned the school board's appropriation for the capital reserve fund of approximately $25,000. Special Term did not reach a determination on the issue, and the item remains in the budget. Inasmuch as the question was not briefed on appeal, we do not rule on it.



has joined in oral argument and by filing a brief,[6] appellants raise certain other issues which will be discussed, including the propriety of the directed repayments in the Jones and Waldert cases, and the propriety of the direction in Bethlehem Steel Corp. v Board of Educ. that respondent revise its budget to exclude the appropriations for pension, Social Security, and health insurance expenses. Further, the defendant-appellant, City of Rochester, and the intervenor-defendant, Thomas R. Frey, argue that section 10 of article VIII of the New York Constitution is unconstitutional under the equal protection and due process clauses of the United States Constitution, but that if section 10 of article VIII should be held to be constitutional then the 2% tax limit for "city purposes" contained in that section should be construed as excluding sums appropriated for educational purposes.

[6]In Jones v City School District of the City of Geneva, the City School Districts of Corning, New York, and Binghamton, New York, were permitted to file briefs *amici curiae*. An *amicus* brief was also received from the City of Buffalo in Waldert v City of Rochester.

I

## THE CONSTITUTIONALITY OF THE EMERGENCY RELIEF ACT (L 1976, CH 349, § 2)

It is conceded in the Legislative Findings (L 1976, ch 349, § 1)[7] that the Emergency Relief Act was tailored so as to avoid the impact of *Hurd v City of Buffalo (supra)*. Appellants contend that the Legislature has in the Emergency Relief Act remedied those aspects of paragraph 42-a (Local Finance Law, § 11.00, subd a) which were found constitutionally deficient in *Hurd*.

[3] First, appellants argue that the statute was passed only as a temporary measure limited to the fiscal year commencing on July 1, 1976 and the three succeeding fiscal years pending the "comprehensive revision of article eight of the constitution" to be undertaken at the constitutional convention which the legislators presumably assumed would be approved by the voters at the general election in 1977 (Legislative Findings, L 1976, ch 349, § 1). The court in *Hurd*, on the other hand, appellants point out, was faced with paragraph 42-a (§ 11.00, subd a) which provided an on-going grant of authority for the exclusion of

[7]The Legislative Findings state in part: "Although the legislature in the past attempted to alleviate the situation by allowing such cities and school districts to exclude the cost of annual pension and social security contributions from computation of tax limitations, the case of *Hurd v City of Buffalo* * * * held such attempt * * * to be unconstitutional. As a result of such decision, the legislature in nineteen hundred seventy-four and nineteen hundred seventy-five enacted legislation which authorized the exclusion of such costs on an emergency basis * * * It is the purpose of section two of this act [viz., Emergency Relief Act] to afford such cities and school districts temporary relief by permitting them to exclude from constitutional tax limitations certain pension and social security contributions until nineteen hundred eighty, while preventing any increase of non-conformity with the determination in the case of *Hurd v City of Buffalo* for the fiscal years of such cities and school districts beginning July first, nineteen hundred seventy-seven." (L 1976, ch 349, § 1.)



retirement and pension conttributions from the constitutional tax limit. We fail to see how the temporary nature of the enactment makes it any less a measure to evade section 10 of article VIII of the New York Constitution which is "palpably in violation of the plan and purpose" of the "unified and interdependent plan to control the taxing and debt-contracting power of the subdivisions of the State" condemned by the court in *Hurd* (34 NY2d 628, at p 629). Furthermore, the soundness of the premise on which appellant's argument is based — that the statute is but a temporary solution pending the amendment or elimination of the constitutional tax limit — must be seriously questioned in view of the defeat in the election of 1977 of the proposed constitutional convention (at which the amendment of article VIII was to be effected) and the prior defeat of the proposed amendment itself in the election of 1975.

[4] Next, appellants assert that the Emergency Relief Act has a greater futurity component than paragraph 42-a (§ 11.00, subd a) because the Emergency Relief Act limits the amount of appropriations for pension and Social Security benefits that may be excluded from the tax limit in the second, third and fourth fiscal years to the amount excluded in the first year. Under paragraph 42-a (Local Finance Law, § 11.00, subd a), on the other hand, all of the amounts for pensions and Social Security could be excluded. Thus, appellants claim that there is greater reason for finding a rational basis in the legislative determination that pension and Social Security benefits have a period of probable usefulness of three years in the Emergency Relief Act than in paragraph 42-a (Local Finance Law, § 11.00, subd a). We disagree.

The arbitrary and inflexible ceiling placed on the amounts of excludable retirement and Social Security appropriations in the second, third and fourth fiscal years clearly can bear no logical relationship to the portions of such appropriations in those years

that could be considered allocable to a reserve for payments to future retirees. Nor can the limitation placed on the exclusions in the second, third and fourth years obviate the constitutional infirmity of the provision with respect to the first fiscal year in which the amounts appropriated for pensions and Social Security may be excluded without limitation. As the *Hurd* court explained, those amounts excluded in the first fiscal year must necessarily include the current payments to pensioners, since "no retirement or pension plan is actuarially sound unless the annual amortization reflects the current burden in disbursements" as well as in reserves for future payments (*Hurd v City of Buffalo*, 34 NY2d 628, 630, *supra*). Indeed, the drafters of the Emergency Relief Act seem to concede the constitutional vulnerability of the legislation with respect to the first fiscal year, for they explain the purpose of the limitations on the exclusions in subsequent years as the prevention of "any *increase* of non-conformity with the determination in the case of *Hurd v City of Buffalo*." (Legislative Findings, L 1976, ch 349, § 1; emphasis added.)

[5] Finally, it is urged that the statute provides for a "temporary emergency solution to the problem currently being encountered by the above listed cities and school districts in order to avoid fiscal and social chaos" (Legislative Findings, L 1976, ch 349, § 1) and that this distinguishing feature saves it from the impact of *Hurd*. Again we must disagree. The fiscal and social problems of the cities and school districts, although admittedly serious in the extreme, do not possess the characteristics of "periods of emergency caused by enemy attack or by disasters (natural or otherwise)" which would, pursuant to the New York Constitution (art III, § 25), warrant suspension of constitutional restrictions on State action under the State police power. In discussing the proper exercise of State police power, the Court of Appeals has stated: "Emergency laws in time of



peace are uncommon but not unknown. Wholesale disaster, financial panic, the aftermath of war [citation omitted], earthquake, pestilence, famine and fire * * * may, as the alternative of confusion or chaos, demand the enactment of laws that would be thought arbitrary under normal conditions." (*People ex rel. Durham Realty Corp. v La Fetra*, 230 NY 429, 444-445, dsmd *sub nom. People ex rel. Brixton Operating Corp. v La Fetra*, 257 US 665, quoted in *Matter of New York Edison Co. v. Maltbie*, 244 App Div 436, 442.)

The financial problems facing the cities and school districts have not emerged suddenly. Nor can it be said that they are of a temporary nature. We take judicial notice that the severe budgetary squeeze in which the cities and school districts are now caught has existed for several years and that cries of emergency and financial crisis have accompanied the several remedial enactments since *Hurd*, including the proposed amendment to section 10 of article VIII of the New York State Constitution. (See, e.g., L 1974, chs 496, 497, which provided for temporary emergency relief limited to the fiscal year 1974-1975 [discussed in *Hurd v City of Buffalo*, Sup Ct, Erie County, March 10, 1975, and *Sullivan v Board of Educ. of City School Dist. of Long Beach*, Sup Ct, Nassau County, Oct. 23, 1975]; and L 1975, chs 322-325, which extended said temporary emergency provisions through the fiscal year 1975-1976.) Thus, without questioning the reality or severity of the financial predicament facing respondents, one must conclude that the problem is not of recent origin and that, in view of the defeat of the proposed constitutional amendment in 1975 and the proposed constitutional convention in 1977, it appears to be anything but temporary.

Furthermore, it is far from clear that the very emergency argument being made here was not urged before the Court of Appeals in *Hurd v City of Buffalo (supra)*. While paragraph 42-a

(§ 11.00, subd a) (L 1969, ch 1105) contained no language denoting the existence of an emergency, it is observed that in the brief submitted to the Court of Appeals by the City of Rochester in *Hurd* it was argued that if "section 11.00 (a) [par 42-a] of the Local Finance Law is declared unconstitutional for whatever grounds, the City of Rochester would be placed in a *disastrous financial situation.*" (Emphasis added.) This argument was answered in a separate reply brief.

*Cherey v City of Long Beach* (282 NY 382) and *Bugeja v City of New York* (24 AD2d 151, affd 17 NY2d 606) lend no more assistance to the Emergency Relief Act than they did to paragraph 42-a (§ 11.00, subd a). No matter how it is characterized, this statute is the very sort of measure "to evade * * * palpably in violation of the plan and purpose" of section 10 of article VIII of the New York Constitution struck down in *Hurd v City of Buffalo* (34 NY2d 628, 629, *supra*). To the extent that *Cherey* and *Bugeja* may be read to hold otherwise, they must be considered to have been overruled or modified by *Hurd*.

## II

## THE CONSTITUTIONALITY OF THE STATE REAL PROPERTY TAX ACT (L 1976, CH 349, § 3)

[6] Having determined that the Emergency City and School District Relief Act is a "device to evade * * * [the] unified and interdependent plan to control the taxing and debt-contracting power of the subdivision of the State" contrary to *Hurd*, it would be difficult indeed for us to reach a different conclusion with respect to its companion "stand-by" statute, the State Real Property Tax Act (L 1976, ch 349, § 3). For the purpose and aims of sections 2 and 3 are exactly the same: "financing the operations of cities and certain school districts" (Heading, L 1976, ch 349) and providing a "temporary emergency solution to



the problem currently being encountered by the * * * cities and school districts in order to avoid fiscal and social chaos." (Legislative Findings, L 1976, ch 349, § 1.)

[7] That the State Real Property Tax Act is labeled a State tax and that the tax is to be collected by the State and remitted to the cities and school districts through the device of State aid do not, as appellants contend, make it a State tax and, therefore, exempt from section 10 of article VIII of the New York State Constitution. For it has the same purpose, has the same effect, and serves the same cities and school districts as the Emergency Relief Act — concededly a measure designed to permit *local taxes*. In effect, it can be said that the State Real Property Tax Act is the Emergency Relief Act but operating under a different name and in a different way. The only difference between the two acts is the way in which they seek to circumvent section 10 of article VIII of the Constitution: the Emergency Relief Act does it through the device of giving a period of probable usefulness to pension and Social Security costs; the State Real Property Tax Act does it by making a State tax out of a local tax.

One can imagine that the implementation of this act, which appears structurally to be so complex, could in actuality require nothing more than a few bookkeeping entries. A credit for the amount of State aid approved for each participating district (which, as pointed out, would be equal to the amount of additional tax that the district would have received if the Emergency Relief Act had permitted the exclusion of pension and Social Security costs from the tax limit) could be entered on the State's books. The State, then, would be entitled to recoup an amount equal to that credit from the district through the State Real Property Tax Act. The district, operating as the State's tax collecting agency (L 1976, ch 349, § 3; State Real Property Tax Act, § 6) would proceed to collect the tax which would then be carried as an off-setting credit to the State on the district's

books. The two matching credits — the amount of State aid carried on the State's books for the account of the district and the amount of the tax collected by the district as agent for the account of the State — would be canceled and the district would keep the tax. There would be no need for the actual transmittal of funds. The net result would be that the district would have levied, collected, and kept the same tax from the same taxpayers in the same amount as it would have under the Emergency Relief Act. Thus, the Legislature's intended scenario, in which the local tax must always appear in the guise of a State tax, may be acted out simply by running the tax through the State's books.

The reasoning of the Court of Appeals in *People v Westchester County Nat. Bank* (231 NY 465) seems pertinent. In determining that a statute, which provided for the issuance of bonds with the express provision that the proceeds should be given as a bonus to residents of New York who served in World War I, authorized a gift of the State's credit prohibited by the New York Constitution, the court looked beyond the form of the proposed transaction to its substance and effect, stating (p 476): "[D]oes this act contemplate a gift of the state's credit? In answering this question the mere form of the transaction is immaterial. If the gift of the bonds of the state to a railroad corporation would be such a gift — and it undoubtedly would be — then so would be an issue of bonds by the state with the express condition that their proceeds should be given to the same corporation. The evasion of the constitutional prohibition would be palpable and it could not and should not be permitted."

[8] Moreover, as respondents have pointed out, because of its lack of uniformity of application the State Real Property Tax Act could not be considered to be a State tax without being in violation of the equal protection and due process clauses of the Fourth Amendment of the United States Constitution and sections 6 and 11 of article I of the New York Constitution. (See *Township of Pine Grove v Talcott*, 19 Wall [86 US] 666, 675.)



Appellants' reliance on *Wein v City of New York* (36 NY2d 610) is misplaced. In *Wein* the court found the New York City Stablization Reserve Corporation Act constitutional against contentions that it permitted the city to borrow in excess of the constitutional debt limit and violated article VIII and article X of the New York State Constitution. The court held (p 619) that "the statutory scheme stays within the letter of the Constitution • • • and carefully so." With the State Real Property Tax Act, on the other hand, as with paragraph 42-a (§ 11.00, subd a) (involved in *Hurd v City of Buffalo*, 34 NY2d 628, 629, *supra*), we have statutes that are "palpably in violation of the plan and purpose" of the Constitution of New York. Indeed, the court in *Wein* noted the distinction, stating (p 618), "In *Hurd*, the letter of the Constitution was being 'twisted.' Here, it is being scrupulously observed in that the city incurs no obligation now or in the future."

[9, 10] We find no merit to the contentions made by the appellant City of Rochester that respondent Waldert's challenge to the State Real Property Tax is prospective and that he presents no justiciable controversy with respect to it. As distinguished from the proposal that was to be submitted to the voters in a referendum in 1977 general election considered in *New York Public Interest Research Group v Carey* (42 NY2d 527), we are dealing here with a statute that is now an effective law of the State. The cities and school districts are permitted to take steps to implement it and have taxes levied under it, if and when the Court of Appeals declares the companion act, the Emergency Relief Act, unconstitutional. As is obvious from this opinion, it is our opinion that the Court of Appeals, based on its *Hurd* decision, will do so and that the question of the constitutionality of the State Real Property Tax Act will be of immediate concern. Under these circumstances, "[t]he fact that the court may be required to determine the rights of the parties upon the hap-

pening of a future event does not mean that the declaratory judgment will be merely advisory. In the typical case where the future event is an act contemplated by one of the parties, it is assumed that the parties will act in accordance with the law and thus the court's determination will have the immediate and practical effect of influencing their conduct (Borchard, Declaratory Judgments, pp 25-28, 75-76)." *(New York Public Interest Research Group v Carey, supra,* pp 530-531.)

In any event the defense of lack of standing to sue because of prematurity and the absence of justiciable controversy has not been raised by the other appellants.

## III

## CHAPTER 484 OF THE LAWS OF 1976

[11] Chapter 484 of the Laws of 1976, *inter alia*, assigns to the cost of current health and dental insurance coverage a period of probable usefulness of three years. Pursuant to this statute and article VIII (§ 11, subd [b]) of the New York State Constitution, the respondent-appellants in Bethlehem Steel Corp. v Board of Educ. have excluded $343,000 of the amounts budgeted for hospital, medical, and dental insurance from the maximum amount of the tax levy permitted by section 10 of article VIII of the New York State Constitution. For the reasons set forth above (see Point I), we hold chapter 484 unconstitutional. (*Hurd v City of Buffalo,* 34 NY2d 628, *supra.*) We add only that if there is any element of futurity in health insurance expenses, it is less discernible than that which may be present in payment for pensions and Social Security.



## IV

## THE CONSTRUCTION OF SECTION 10 OF ARTICLE VIII OF THE NEW YORK STATE CONSTITUTION

The argument of appellant City of Rochester that the 2% tax limit for "city purposes" imposed by article VIII (§ 10, subd [b]) of the New York Constitution should be construed as excluding sums appropriated for educational purposes has been answered in *Board of Educ. v Van Zandt* (119 Misc 124, 126, affd 204 App Div 856, affd 234 NY 644). The words of Justice RODENBECK at Special Term are still apt: "[I]t has been assumed for nearly four decades * * * that 'city purposes' as used in the section includes all taxes which the city may legally impose. Although this section was amended by the new Constitution of 1894 and again in 1899, 1905, 1908 and 1917, the first and last sentences containing the words 'city purposes' remained unaltered. If there had been any misunderstanding of the meaning of those terms or any contradiction, some amendment would have been proposed."

[12] None of the amendments to section 10 of article VIII that have taken place since Justice RODENBECK's decision in 1922 has altered the phrase "for city purposes" or evinced any intention of modifying or repealing the construction that has consistently been given to the section by the practice of local and State officials over the course of almost 100 years of including education expenses with other city expenses in the computation of the 2% limit for cities of the size of Rochester. It must be assumed that the drafters of these amendments to section 10 of article VIII were aware of the phrase "for city purposes" and the way it had been and was being interpreted, and that, if they had intended to change the effect of the section, they would have made the appropriate amendment.

Furthermore, consideration must be given to the practical construction that has been placed on the section (McKinney's Cons Laws of NY, Book 1, Statutes, § 127); and the long-continued course of action by administrative or executive officers charged with administering the provision is, under the circumstances, entitled to great weight. (McKinney's Cons Laws of NY, Book 1, Statutes, § 129, subd a.)

## V

## THE VALIDITY OF SECTION 10 OF ARTICLE VIII OF THE NEW YORK CONSTITUTION UNDER THE UNITED STATES CONSTITUTION

[13] The City of Rochester's argument that section 10 of article VIII is in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution because its tax limitations are founded on unlawful and suspect classifications is without merit. The classifications based on the size and nature of the municipalities and school districts set forth in section 10 cannot be said to be of the "suspect" type such as those involving race, national origin, religion, or sex where the burden is cast upon the party relying on the provision to justify its constitutionality. (See *Califano v Goldbarb*, 430 US 199; *Craig v Boren*, 429 US 190; *Weinberger v Wiesenfeld*, 420 US 636; *Frontiero v Richardson*, 411 US 677; *Reed v Reed*, 404 US 71.)

We cannot say that such classifications, under which the counties, cities, villages, school districts, and the State have operated and on which they and the taxpayers have relied for almost 100 years, are irrational or without a reasonable basis in fact. As stated in *Magoun v Illinois Trust & Sav. Bank* (170 US 283, 296): "There is therefore no precise application of the rule of



reasonableness of classification, and the rule of equality permits many practical inequalities. And necessarily so. In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

In view of the strong presumption of constitutionality that must attach to section 10 of article VIII, under these circumstances, we hold that the provision is constitutional and reject appellant's argument that there are questions of fact presented in the record which require a hearing on the issue.

## VI

## THE DIRECTED REFUNDS IN WALDERT AND JONES

[14] We see no reason for departing from the rule stated in *Hurd v City of Buffalo* (34 NY2d 628, affg 41 AD2d 402 on opn of Moule, J., *supra*), and accordingly hold that it was error to direct the repayments of portions of taxes paid by plaintiffs under the 1976-1977 tax levies in Waldert v City of Rochester and Jones v City School District of Geneva. (See *Pellnat v City of Buffalo*, 87 Misc 2d 742, revg 80 Misc 2d 849, affd 59 AD2d 1038.) As stated by Justice Moule in his opinion in *Hurd* (41 AD2d, at pp 405-406):

"Although we find the statute unconstitutional, the fact is that the city has relied on the additional taxes which it was able to impose because of the statute, and has spent the revenues derived thereby. In *Lemon v. Kurtzman* (411 U.S. 192, 199, 207), the Supreme Court affirmed a District Court decision (348 F. Supp 300) permitting the State of Pennsylvania to make payments to nonpublic sectarian schools for services rendered prior to the date the law providing for such services and payments was found unconstitutional. * * *

"Precisely the same considerations are present in this case. The city administration relied upon the statute in preparing its

budget and to mandate repayment of amounts illegally collected in the past would place an impossible burden upon it and, in any event, it would be liable only for those taxes paid under protest."

That the Legislature since the *Hurd* decision of this court in 1973 has annually passed statutes designed to obviate the effect of *Hurd*, does not make the rationale of Justice Moule's opinion any less applicable. The point is that when they levied the taxes in July, 1976, the school districts did so in reliance on chapter 349 of the laws of 1976 which had been duly enacted as the law of this State and was not under challenge. Furthermore, when they did so, one of the previous legislative efforts to obviate the *Hurd* ruling had been held constitutional in two decisions *(Hurd v City of Buffalo*, Sup Ct, Erie County, March 10, 1975, and *Sullivan v Board of Educ. of City School Dist of Long Beach*, Sup Ct, Nassau County, Oct. 23, 1975).

## VII

## THE RELIEF IN BETHLEHEM STEEL CORP. V BOARD OF EDUCATION

We hold that Special Term improperly directed the Board of Education of the Lackawanna City School District to revise its final budget so as to reflect the court's holding that pension, Social Security, and health insurance expenses should not have been excluded in computing the amount of maximum tax levy as limited by section 10 of article VIII of the New York Constitution.

The basis for petitioner's proceeding and for the relief it seeks is the illegal tax — illegal because it is in excess of the limit imposed by section 10 of article VIII of the Constitution. It is aggrieved because it has paid or is being compelled to pay a tax which it claims is unconstitutional. Its remedies include paying the tax under protest and suing to get it back or, if it chooses,



refusing to pay the portion of the tax which it deems illegal at the risk of paying penalties if the tax should subsequently be held valid.

There is nothing before us to show that the Lackawanna school board has not duly adopted and published the final budget in accordance with the Education Law after preparing a tentative budget and conducting a public hearing. (Education Law, §§ 2516-2519.) Nor is there any suggestion that the board has acted arbitrarily or capriciously or exercised anything but good faith in adopting the budget and including in it those items that it deemed necessary for the operation of the school system (Education Law, §§ 2503, 2516) and doing so in reliance on chapter 349 of the Laws of 1976. Petitioner does not contend that any item in the budget is unnecessary, illegal, or improper. Its concern is with the excessive tax which we hold to be illegal and for which it may pursue the appropriate remedy, not with the discretionary actions of the school board in performing its statutory functions over which the court has no authority. (See *Matter of Gimprich v Board of Educ.*, 306 NY 401; *Matter of Gorfinkel v Allen*, 58 Misc 2d 43.)

Petitioner has requested alternate relief—viz., that the court declare that *"if it appropriately protests* the payment of any tax billed to it" (emphasis added), it shall be entitled to a refund. It does not appear in the record whether petitioner-appellant has paid under protest any or all of its tax bill. We note that the attorney for the school board in his affidavit in opposition to appellant's motion for an injunction has stated:

"The taxpayer-petitioner has the legal right to pay these tax bills 'UNDER PROTEST' and will be legally protected.

"That, if in the future it is the final decision of the Appeals Court that the statutes in question are unconstitutional, then the taxpayer-petitioner does have a remedy for repayment of

such alleged unlawful or illegal tax payments by legal application for a tax refund."

Because the facts concerning payment under protest are not now before us and because the school board is apparently willing to make a refund if and when the Court of Appeals should decide that chapter 349 of the Laws of 1976 is unconstitutional, it would be premature and could be unnecessary for us to give what would amount to an advisory opinion. (See *New York Public Interest Research Group v Carey*, 42 NY2d 527, *supra.)* The matter would be better resolved, if it is not eventually resolved by agreement, in a lawsuit for a refund in which all the facts will be before the court.

The judgments below should be modified, on the law, in accordance with this opinion and otherwise affirmed.

Moule, J.P., Cardamone, Simons and Denman, JJ., concur.

Judgments unanimously modified, on the law, in accordance with opinion by Hancock, Jr., J., and, as modified affirmed, without costs.